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NO. _____

IN THE SUPREME COURT

of the

UNITED STATES

October Term 1983

THE MUCKLESHOOT INDIAN TRIBE; AGATHA JERRY STARR; DONALD JERRY; LAWRENCE JERRY; BERT MOSES; HERMAN MOSES; CECIL MOSES; and HOWARD MOSES,
Respondents,

v.

TRANS-CANADA ENTERPRISES, LTD.; SYNERGY INTERNATIONAL, LTD.; and HERBERT GUENTHER, *Petitioners.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND L. DAVIS
COUNSEL OF RECORD
Suite 100, 2615 Fourth Avenue,
Seattle, Washington 98121
Telephone: (206) 292-1550

ROBERT E. RATCLIFFE
Duncan Building, Third Floor
315 Second Avenue South
Seattle, Washington 98104
Telephone: (206) 622-7050
Counsel for Petitioners

SUNRISE PRINTING — SEATTLE, WA

QUESTION PRESENTED

The question presented is whether or not historical tribal dependence upon fishing overcomes the presumption against the conveyance by the United States to the tribe of beds of navigable waters within an Indian reservation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Trans-Canada Enterprises, Ltd. and Herbert Guenther respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals was issued on August 15, 1983 and is reported at 713 F.2d 455. (Appendix A). The companion case of *Puyallup Indian Tribe v. Port of Tacoma* was also decided by the Ninth Circuit on August 15, 1983, but is not yet reported. (Appendix B).

JURISDICTION

The Ninth Circuit's opinion was issued of August 15, 1983. This petition was timely filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

10 Stat. 1132 (December 26, 1854), Treaty of Medicine Creek (Appendix C).

12 Stat. 927 (January 22, 1855), Treaty of Point Elliott (Appendix D).

Executive Order, April 9, 1874

Muckleshoot Reserve.

[In Tulalip Agency, area, 5, square miles.] (For Executive orders of January 19 and 20, 1857, relative to Muckleshoot Reserve, see "Nisqually Reserve," below.)

EXECUTIVE MANSION, *April 9, 1874*

It is hereby ordered that the following tracts of land in

Washington Territory, viz: Sections 2 and 12 of township 20 north, range 5 east, and sections 20, 28 and 34, of township 21 north, range 5 east, Willamette meridian, be withdrawn from sale or other disposition, and set apart as the Muckleshoot Indian Reservation, for the exclusive use of the Indians in that locality, the same being supplemental to the action of the Department approved by the President January 20, 1857.

U.S. GRANT

STATEMENT OF THE CASE

The Muckleshoot Indian Tribe is composed of descendants of Indians who lived in villages along the White, Green, Upper Puyallup, Black and Duwamish Rivers and their tributaries during the mid-1800's in what is now western Washington State. The rivers and streams along which they lived were the focal point of their economy, culture and religion. They were dependent on these watercourses for food, materials, self-identification, language and religious practices.

Isaac Stephens was instructed on behalf of the United States government to induce these Indians to move voluntarily onto reservations. Treaties were concluded with the ancestors of the Muckleshoot Indian Tribe. They were parties to the Treaty of Medicine Creek, 10 Stat. 1132, concluded on December 26, 1854 and the Treaty of Point Elliott, 12 Stat. 927, concluded on January 22, 1855, which ceded the land in western Washington Territory to the United States and set aside certain specifically described reservations. (Appendices C and D).

The Treaty of Medicine Creek and the Treaty of Point Elliott also secured to the Indians in Articles III and V, respectively, the following: "The right of taking fish, at all usual and accustomed grounds and stations . . ."

This right to take fish included fishing outside of and within the reservations.

The lands in dispute, specifically the bed of the White River, were not included in the original reservations. The treaties provided that the President of the United States could, in the interest of Washington Territory and the welfare of the Indians, select additional land for reservations. In 1856 Isaac Stephens promised to make changes in the boundaries of the reservations designated in the treaties and provide a

new reservation on land along the White and Green Rivers.

In 1874 President Grant signed an Executive Order setting apart five alternate sections of land through which the White River flowed as an enlargement to the Muckleshoot reservation. The enlargement was a direct result of the United State's government's concern that the Muckleshoot Indians be provided a traditional fishery within their reservation boundary.

The entire Executive Order is set forth as follows:

Muckleshoot Reserve

Executive Mansion, April 9, 1874

> It is hereby ordered that the following tracts of land in Washington Territory, viz: Sections 2 and 12 of township 20 north, range 5 east, and sections 20, 28 and 34, of township 21 north, range 5 east, Willamette meridian, be withdrawn from sale or other disposition, and set apart as the Muckleshoot Indian Reservation, for the exclusive use of the Indians in that locality, the same being supplemental to the action of the Department approved by the President January 20, 1857.
>
> U.S. GRANT

(Appendix E)

Washington became a state in 1889.

At the time of the Executive Order two channels of the White River flowed through Section 28 of the reservation as enlarged by that Executive Order.

Patents which conveyed Allotments riparian to the southern channel to individual Indian families included that bed and land on either bank in the acreage assigned to the Allotments. The southern channel stopped carrying water on a perennial basis by 1915 and has been completely dry for at least the past fifty-five years.

The bed of the northern channel was not included in any Allotments of lands riparian to it. That channel has moved further to the north since 1874.

The Muckleshoot Indian Tribe filed its complaint on December 16, 1977 in the United States District Court for the Western District of Washington at Seattle to eject the petitioners from the former beds of both the southern and northern channels of the White River and the land between the former and present northern channel of that river. The petitioners are the successors in interest of the Allottees of the Allotments which had included the bed of the southern channel and which were bordered by the northern channel.

The Muckleshoot Indian Tribe and the petitioners stipulated that the northern channel was navigable in 1874 and the district court found at trial that the southern channel had also been navigable.

The district court concluded that the United States had conveyed title to the beds of the White River within the reservation as enlarged by the Executive Order to the ancestors of the Muckleshoot Indian Tribe.

The district court also concluded that the bed of the southern channel was included in the Allotments solely on the basis of surveyors' erroneous judgments that it was not navigable, and the United States through those Allotments had not divested the ancestors of the Muckleshoot Indian Tribe of title to that bed.

The district court also concluded that the reasons that the southern channel had become dry and the northern channel had moved to the north were major floods, landslides and human interference that were avulsive in nature.

Based upon these conclusions the district court ejected the petitioners from the former beds of the river and the land between the former and present northern channel. The district court's judgment was entered on March 12, 1981.

That judgment was vacated by the Ninth Circuit Court of Appeals and remanded to the district court to consider any further evidence and points and authorities it deemed appropriate in light of *Montana v United States,* 450 U.S. 544 (1981). The *Montana* case was decided after the entry of the district court's judgment.

On remand the parties did not present and the district court did not consider any additional evidence.

On July 9, 1982 the district court reinstated its original judgment.

On August 15, 1983 the Ninth Circuit Court of Appeals affirmed the district court's judgment. *Muckleshoot Indian Tribe v. Trans-Canada Enterprises,* 713 F.2d 455 (9th Cir. 1983) (Appendix A). The decision of the Ninth Circuit was based upon the analytical framework set forth in a companion case decided the same day, *Puyallup Tribe v. Port of Tacoma,* ____ F.2d ____ (9th Cir. 1983) (Appendix B).

The Ninth Circuit ruled that where a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.

The district court had jurisdiction pursuant to 28 U.S.C. § 1362. The Court of Appeals had jursdiction pursuant to 28 U.S.C. § 1291.

REASONS WHY WRIT SHOULD BE ISSUED

A. This Court Did Not Determine That Historical Tribal Dependence Upon Fishing Overcomes The Presumption Against The Conveyance By The United States To The Tribe Of Beds Of Navigable Waters Within An Indian Reservation.

1. *Montana v. United States.*

In *Montana v. United States,* supra this Court set forth the following principles to determine fee title to the beds of navigable waters within the boundaries of an Indian reservation.

First, the federal government holds land under navigable waters in trust for future states to be granted to those states when they enter the Union and assume sovereignty on an equal footing with the existing states.

Second, because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land "except because of some special duty or exigency."

Third, the court deciding a question of title to the bed of navigable water must begin with a strong presumption against conveyance by the United States.

Fourth, the court must not infer the conveyance of the bed of a navigable water:

> "unless the intention was definitely declared or otherwise made plain," *United States v. Holt State Bank,* supra, 270 U.S. at 55, or was rendered "in clear and special words," *Martin v. Waddell,* supra, 41 U.S. at 411, or "unless the claim confirmed in terms embraces the land under the waters of the stream," *Packer v. Bird,* supra, 137 U.S. at 672.

Montana, v. United States, supra, 450 U.S. at 552.

Thus, this Court has stated that the conveyance of the bed of a navigable water to the tribe will not be inferred unless a special duty or exigency existed and the intention to convey:

1) was definitely declared or otherwise made plain;
2) was rendered in clear and special words; or
3) the claim confirmed in terms embraces the land under the waters of the stream.

Absent such a conveyance, the beds of navigable waters would be granted to the state when it entered the Union on an "equal footing" with the established states. *Pollard's Lessee v. Hagan,* 3 How 212, 222-223.

The Tribe in this case did not argue that the language in the Executive Order supported any inference that the Tribe was conveyed title to the bed of the White River. A similar argument by the Crow Indian Tribe was unsuccessful in the *Montana* case:

> Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of that river bed. The treaty in no way expressly refers to the river bed, *Packer v. Bird,* supra, 137 U.S. at 672, nor was an intention to covey the river bed expressed in "clear and special words," *Martin v. Waddell,* supra, 41 U.S. at 411, or "definitely declared or otherwise made plain," *United States v. Holt State Bank,* 270 U.S.

> at 55. Rather, as in *Holt,* "the effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory."

Montana, supra, 450 U.S. at 554.

The 1874 Executive Order simply states that the "following tracts of land in Washington Territory . . . be withdrawn from sale or other disposition, and set apart as the Muckleshoot Indian Reservation, for the exclusive use of the Indians in that locality . . . ."

The Executive Order neither mentions the White River nor conveys title to the bed of that river to the Tribe. The land described is set apart for the "exclusive use" of the Indians.

Nor did the Tribe argue that because portions of the White River were wholly within the confines of the enlargement, that the United States intended to convey title to the beds of that river to the Tribe. That argument was also expressly rejected in *Montana v. United States.*

> The mere fact that the bed of navigable water lies within the boundaries described within the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance.

Montana, supra, 450 U.S. at 554.

The *Montana* decision reaffirmed principles set forth fifty-five years earlier in *United States v. Holt State Bank,* 270 U.S. 49 (1926). In *Holt State Bank* this Court affirmed the decison of the Eight Circuit Court of Appeals that the bed of a navigable lake within the boundaries of the Red Lake Indian Reservation was not granted to the Chippewas because there was nothing in the pertinent treaties "which even approach[ed] a grant of right in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State." *Holt State Bank, supra,* 270 U.S. at 58-59.

This court in *Montana* did not overrule *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970). *Choctaw Nation* held that the bed of the Arkansas River had been granted by the United States to the Choctaw and Cherokee Nations pursuant to the Treaty of Dancing Rabbit Creek in 1830 and the Treaty of New Echota in 1835. This

Court did, however, point out that *Choctaw Nation* was based upon "very peculiar circumstances" which "arose from the unusual history of the treaties there at issue" and the United States government's promise that the reserved lands would never become part of any state. *Montana, supra,* 450 U.S. at 555-556, n.5[1].

This Court in *Montana* chose not to adopt the rule of construction pointed out in *Choctaw Nation* that a treaty should be interpreted as the Indians would have understood it, if the effect of such an interpreation would divest a State of title to the bed of a navigable river. *Montana, supra,* 450 U.S. at 552-553; *id.* at 567-568 (Stevens, J. concurring).

This Court did, however, point out that "at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." *Montana, supra,* 450 U.S. at 556.

It is submitted by the petitioners that the fishing dependency of the tribe relates solely to whether or not a "public exigency" existed that would have justified the United States conveying to a tribe the bed of a navigable water. If such a "public exigency" existed, the intention to grant the bed must still have been declared or otherwise made plain, or rendered in clear and special words.

2. ***Rulings by the Courts of Appeals***

a. *The Ninth Circuit Court of Appeals*

The Ninth Circuit Court of Appeals has concluded that historical tribal dependence on fishing overcomes the presumption against the conveyance of the bed of a navigable water in four post-*Montana* decisions, including this case.[2]

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1. As the result of the *Choctaw Nation* decision the Arkansas River is the only navigable river which the United States Supreme Court has found to be owned by an entity other than a state. *Cherokee Nation v. Muskogee City - County Port Authority,* 555 F.Supp. 1015, 1017 (1983).

2. *Confederated Salish and Kootenai Tribe v. Namen,* 665 F.2d 1951 (9th Cir. 1982), *cert. denied,* 103 S.Ct. 314 (1982); *United States v. Washington,* 694 F.2d 188 (9th Cir. 1982); *Puyallup Indian Tribe v. Port of Tacoma,*____ F.2d____ (9th Cir. 1983); *Muckleshoot Indian Tribe v. Trans-Canada Enterprises,* 713 F.2d 455 (9th Cir. 1983).

The Ninth Circuit has concluded, however, in one case that the tribe was not dependent enough upon a river to overcome the presumption.[3]

In *Confederated Salish and Kootenai Tribes v. Namen,* 665 F.2d 1951 (9th Cir. 1982), *cert. denied,* 103 S. Ct. 314 (1982), the Ninth Circuit was requested to review post-*Montana* the issue of title to the bed of the south half of Flathead Lake in Montana. The Ninth Circuit had held in *Montana Power Company v. Rochester,* 127 F.2d 189 (9th Cir. 1942), that the United States held title to that bed in trust for the Confederated Tribes.

In reviewing the title question the Ninth Circuit upheld the *Rochester* ruling by *stare decisis,* the language of the treaty involved, and the circumstances surrounding the treaty's negotiation.

In the *Namen* case the Ninth Circuit ruled that *stare decisis* applied particularly because *Rochester* had affected title to land and hydro-electric power development on the Flathead Reservation had proceeded for half a century on the assumption that the Confederated Tribes had title to the bed of the south half of the lake. *Namen, supra,* 665 F.2d at 960.

The Ninth Circuit also relied upon the terms of the Hell Gate Treaty which did expressly refer to Flathead Lake in defining the boundaries of the reservation.

> It would have been pointless, and quite likely deceptive, to have the northern boundary of the reservation bisect the Flathead Lake unless it was intended to convey title to the southern half of that lake to the Indians. Certainly the most natural and intelligible way of understanding the boundary description is to infer an intent to convey the southern lakebed.

Namen, supra, 665 F.2d at 962.

As a third basis for the Court's decision, it also pointed out that the Kootenai Indians, one of the confederated tribes, had depended heavily upon fishing, and that that circumstance surrounding the negotiation of the treaty distinguished it from *Montana.*

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3. *United States v. Aranson,* 696 F.2d 654 (9th Cir. 1983).

> There are factual differences between *Montana* and *Confederated Salish [Namen]*. However, as Justice Rehnquist points out [103 S. Ct. 314 (Rehnquist, J., dissenting), denying cert. to *Namen*], the exact limits of the *Montana* holding are not clear. Given the importance of certainty where issues of ownership of land are involved, the possiblity of conflict suggested by Justice Rehnquist warrants consideration of the issue by the Supreme Court.

Namen, supra, 665 F.2d at 962.

In *United States v. State of Washington,* 694 F.2d 188 (9th Cir. 1982), the Ninth Circuit resolved a dispute over Indian fishing rights by holding that the Quinault Indians owned a lakebed because it was specifically included in and formed a boundary of their reservation and they were dependent upon fishing when the treaty was signed.

The Ninth Circuit relied heavily upon its prior decision in *Namen.* It did, however, acknowledge that its decision might not be consistent with *Montana* and requested that this Court address that issue.

> There are factual differences between *Montana* and *Confederated Salish [Namen]*. However, as Justice Rehnquist points out [103 S. Ct. 314 (Rehnquist, J., dissenting), denying cert. to *Namen*], the exact limits of the *Montana* holding are not clear. Given the importance of certainty where issues of ownership of land are involved, the possiblity of conflict suggested by Justice Rehnquist warrants consideration of the issue by the Supreme Court.

United States v. State of Washington, 694 F.2d 188, 189 (9th Cir. 1982).

In *United States v. Aranson,* 696 F.2d 654 (9th Cir. 1983), however, the Ninth Circuit reached a different result in determining title to the easterly half of the bed of the Colorado River. The dispute was whether or not that bed was included within the Colorado River Indian Reservation.

The Ninth Circuit in *Aranson* stated as follows:

> The *Montana* decision forecloses any argument that Congress intended to convey land underlying navigable waters unless an express reference to the bed beneath the waters can be found in the grants establishing the reservation.

Aranson, supra, 696 F.2d at 664.

The Ninth Circuit further recognized that *Montana* had displaced the rule of construction that treaties should be interpreted as the Indians would have understood them if the effect of such an interpretation would divest a state of title to the bed of a navigable water. *Aranson, supra,* 696 F.2d at 664, n.7.

Nothwithstanding this analysis, the Ninth Circuit went on to conclude that "*Montana* permits a court to infer congressional intent to convey the bed beneath navigable waters if the Indians can prove they depended heavily on the particular body of water." *Aranson, supra,* 696 F.2d at 666. It then ruled that these Indians were not dependent enough upon the Colorado River to overcome the presumption.

In *Puyallup Indian Tribe v. Port of Tacoma,* ____F.2d____(9th Cir. 1983) and this case, *Muckleshoot Indian Tribe v. Trans-Canada Enterprises,* 713 F.2d 455 (9th Cir. 1983), the Ninth Cirucit specifically held that where a reservation includes within its boundaries a navigable water and the tribe is dependent upon fishing, then the reservation includes the bed of the navigable water if the United States was aware that the water resource was important to the tribe. *Puyallup Indian Tribe, supra,* ____ F.2d ____; *Muckleshoot Indian Tribe, supra,* 713 F.2d at 457.

The Ninth Circuit in the *Puyallup* and *Muckleshoot* cases found that *Montana* had not overruled the principle set forth in *Choctaw Nation* that treaties must be interpreted as the Indians would have understood them and that any doubt should be resolved in the Indians' favor. That principle was critical to the decision reached.

This interpretation of *Montana* is in direct conflict with the concurring opinion of Justice Stevens in that case, *Montana, supra,* 450 U.S. 567-569, with *Aranson, supra,* and with a decision of the Seventh Circuit Court of Appeals.

b. *Seventh Circuit Court of Appeals*

In *State of Wisconsin v. Baker,* 698 F.2d 1323 (7th Cir. 1983), the Seventh Circuit upheld the judgment of the district court that the 1854

treaty between the United States and the Chippewa Indians of Lake Superior and the Mississippi River did not confer upon the Indians the exclusive right to fish and hunt in the waters of navigable lakes within the outer boundaries of the reservation established.

In so ruling, the Seventh Circuit disagreed with the Ninth Circuit's interpretation of *Montana.*

First, the Seventh Circuit found that the rule that Indian treaties are to be interpreted as the Indians would have understood them does not apply when the effect of such a rule would be to divest a state of its sovereign power. *Baker, supra,* 698 F.2d 1334, n.12.

Second, the Seventh Circuit found that the importance to the tribe of fisheries was not sufficient to overcome the presemption that the United States did not grant its rights in the navigable waters to the tribe.

> Defendants argue that the importance to the Band of fisheries secure from the threat of public invasion was sufficiently great in 1854 to overcome this presumption. The district court disagreed and so do we. There is nothing in the language or history of the treaties to suggest that in 1854 the United States was more solicitous of Chippewa fishing and hunting rights in navigable waters than of state sovereignty.

Baker, supra, 698 F.2d at 1335.

The Seventh Circuit's interpretation of *Montana* is inconsistent with the interpretation of the Ninth Circuit.

B. This Court Should Determine That Historical Tribal Dependence Upon Fishing Does Not Overcome The Presumption.

There is no dispute that the ancestors of the Muckleshoot Indians depended upon use of the White River for fishing purposes. That use should have been and was protected by the terms of the Treaties and the Executive Order. Not to have had that use would have destroyed their hopes for economic self-sufficiency and survival.

The fact of this historical dependence upon fishing does not necessarily mean that the United States would have intended to grant the bed of this river to the ancestors of the Muckleshoot Tribe.

Those fishing rights were specifically protected under Article III of the Treaty of Medicine Creek and Article V of the Treaty of Point Elliott. Those fishing rights have been protected by numerous federal court decisions. *Puyallup Tribe v. Washington Game Department,* 433 U.S. 165, 53 L. Ed. 2d 667 (1977).

The Muckleshoot Tribe seeks to extend the historical fishing rights guaranteed by the treaties to title to the dry bed of the White River. The right to use the river is an entirely separate and distinguishable element of real property from title to the bed of the river itself.

The Muckleshoot Tribe fails to appreciate that distinction and it would have this Court conclude that the guarantees of fishing and water rights also evince an intent by the United States to grant the bed of the river itself. There is no basis in law or logic for reaching that conclusion.

Indeed, the rights of fishing, boating, swimming, and other related purposes are generally regarded as corollary to the right of navigation in the use of public waters rather than related to title to the bed of the waterway itself. *Wilbour v. Gallagher,* 77 Wn.2d 306, 316, 462 P.2d 232, 239 (1969). *Witcher v. State,* 87 N.H. 405, 181 A. 549 (1935). *Nelson v. DeLong,* 213 Minn. 425, 7 N.W.2d 342 (1942).

The Muckleshoot Tribe's commingling of fishing and water rights with title to the bed lacks precision. These interests are obviously related, but are also clearly distinguishable.

> Water, like air, being movable and unfixed, and incapable of individual appropriation and disposition, necessarily must be subject to public control for the general welfare. No one but the owner of land has the right to reduce to possession such common property as may be above, beneath, or on the surface of such land; but even he cannot exercise such right except as the state may permit. The water of a stream, lake or pond cannot be dealt with as real property on account of its mobile and evanescent nature; but while it is over a particular tract of land it is part of such land, and a deed to the land would pass the water on it at the time. One may own the land on both sides of a stream, including all the soil over which the water of the stream flows, but he has no absolute ownership in the waters of such stream. However, a right may be acquired to use running water, and the law regards such right as property and protects it as such. There may be a right to use the water but not absolute ownership of its corpus.

1A *Thompson on Real Property*, § 261, pp. 320-321.

This commingling of interests is the only argument the Muckleshoot Tribe puts forth to overcome the strong presumption against the conveyance of the bed of the White River. This is the only argument that the Muckleshoot Tribe puts forth to establish that a "special duty or exigency" existed and that the intention by the United States to convey the bed "was definitely declared or otherwise made plain." *Montana, supra*, 450 U.S. at 552.

This argument does not hold up under strict scrutiny. Fishing rights were protected by the Treaties both within and outside of the reservation. Historical dependence upon fishing should not overcome the presumption that the government has not limited its sovereign power by granting the bed of a navigable river.

The Muckleshoot Tribe cites *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) in support of its argument.

The *Alaska Pacific Fisheries* case was a suit by the United States to enjoin a tribal corporation from maintaining an extensive fish trap erected by it in navigable waters off the Annette Islands in Alaska. The fish trap was erected approximately 600 feet from the high tideline of one of the islands and the question before the court was whether or not the lands reserved for the tribe included the waters and submerged lands adjacent to the islands.

> The principal question for decision is whether the reservation created by the Act of 1891 embraces only the upland of the island or includes as well the adjacent water and submerged land. The question is one of construction — of determining what Congress intended by the words "the body of lands known as Annette Islands."

Alaska Pacific Fisheries, supra, 248 U.S. at 87.

In order to determine what Congress intended by "the body of lands known as Annette Islands," the Court considered the fishing background of the tribe. The Court concluded as follows:

> It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as

> Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters, as well as the upland — in other words, as descriptive of the area comprising the islands.

Alaska Pacific Fisheries, supra, 428 U.S. at 89.

The *Alaska Pacific Fisheries* case was a dispute over fishing rights and to resolve that dispute this Court had to define "the body of lands known as Annette Islands" as used in the Act of 1891. This Court concluded that the navigable waters were within the reservation.

CONCLUSION

For all of the foregoing reasons the petitioners respectfully request that a writ of certiorari should issue to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

RAYMOND L. DAVIS
COUNSEL OF RECORD

ROBERT E. RATCLIFFE
Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE MUCKLESHOOT INDIAN TRIBE:
AGATHA JERRY STARR; DONALD JERRY;
LAWRENCE JERRY; BERT MOSES; HERMAN MOSES;
CECIL MOSES; and HOWARD MOSES,
Plaintiffs-Appellees

v.

TRANS-CANADA ENTERPRISES, LTD.;
SYNERGY INTERNATIONAL, LTD.; and
HERBERT GUENTHER,
Defendants-Appellants.

No. 82-3439
D.C. NO. C77-909R
OPINION

Appeal for the United States District Court
for the Western District of Washington
Hon. Barbara J. Rothstein, District Judge, Presiding.

Argued and Sumbitted: January 4, 1983

BEFORE: BROWNING, Chief Judge, and FLETCHER and
PREGERSON, Circuit Judges.

PER CURIAM:

This appeal involves a question of title to the former bed of the White River as it passes through the Muckleshoot Indian Reservation. The district court found that the United States had reserved the bed of the river for the use of the Tribe when the Government, by Excutive Order, expanded the Muckleshoot Reservation in 1874. From this adverse judgment, appellants (Trans-Canada) appeal. This court's jurisdiction rests on 28 U.S.C. § 1291 (1976). We affirm the district court's carefully considered judgment.

I

In December 1977, plaintiffs (Muckleshoot Tribe) filed suit in district court for declaratory judgment, quiet title, and ejectment, seeking to assert a claim to certain lands that were formerly the bed of the White River as it passed through the Muckleshoot Reservation.

The Muckleshoot Tribe comprises decendants of Indians who once lived in villages along many of the Puget Sound riviers, including the White River. Ancestors of the Muckleshoot Tribe were parties to the Treaties of Medicine Creek and Point Elliott in 1854. *See generally* A. Josephy, *Now That the Buffalo's Gone* 181-85 (1982). These treaties ceded Indian land in Western Washington to the United States and reserved land for the exclusive use of the signatory tribes. In addition, the treaties secured to the tribes on- and off-reservation fishing rights. *See* Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, Jan. 22, 1855, 12 State. 927.

The original Muckleshoot Reservation had no direct access to any of the Tribe's traditional fishing streams, however. The Tribe was unhappy with this arrangement and repeatedly lodged protests with the Government between 1856 and 1874. In 1874, President Grant signed an Executive Order setting apart five alternate sections of land through which the White River flowed as an enlargement to the Muckleshoot Reservation.[1] The enlargement was a direct response to the Tribe's desire to have a traditional fisher within the reservation boundaries.

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1. The order in its entirety states:

> It is hereby ordered that the following tracts of land in Washington Territory: Sections 2 and 12 of township 20 north, range 5 east, and sections 20, 28 and 34, of township 21 north, range 5 east, Willamette meridian, be withdrawn from sale or other disposition, and set apart as the Muckleshoot Indian Reservation, for the exclusive use of the Indians in that locality, the same being supplemental to the action of the Department approved by the President January 20, 1857.

The brevity of the Executive Order is not unusual. *See, e.g., Skokomish Indian Tribe v. France,* 320 F.2d 205, 206-07 (9th Cir. 1963) (quoting an executive orde of Feb. 25, 1874).

In 1874, the White River had a north and a south channel as it flowed through the reservation. The north channel was navigable, the south channel less clearly so. By 1915, the south channel was dry. Allotments riparian to the south channel made prior to 1915, however, included the bed of the south channel in the acreage assigned to individual Indian families. These conveyances were premised on the government surveyor's conclusion that the south channel was not navigable. Trans-Canada claims title to the bed of the former south channel as the successor in interest to the Indian allottees.

Below, the Tribe argued, and the district court found, that the south channel was indeed navigable at the time of the allotment survey. Consequently, title to the riverbed could not have been included in the original allotments. Moreover, the district court concluded that title to the navigable south channel was conveyed to the Tribe by the 1874 Executive Order and that no act in the intervening years had divested the Tribe of the title to the riverbed it received in 1874. Thus, the district court ejected Trans-Canada and confirmed the Tribe's title to the former riverbed.

With respect to the north channel of the White River, the court recognized that the channel had moved appreciably southward since 1874. The court found that this movement was the result of avulsion rather than accretion or erosion and hence that title to the north channel riverbed as it lay in 1874 remained with the original owner of the riverbed absent a subsequent conveyance. *See Puyallup Tribe of Indians v. Port of Tacoma,* ____ F.2d____ ,____ (9th Cir. 1983). Since the district court found no subsequent conveyance, it ejected appellants and confirmed the Tribe's title to the former north channel riverbed as it lay in 1874.

Appellants, ejected possessors of the former south and north channel riverbeds, appealed the district court's decision, arguing that the trial court erred in finding a conveyance of the riverbed to the Tribe in the 1874 Executive Order. This court, by order, remanded the case to the district court for reconsideration in light of *Montana v. United States,* 450 U.S. 544 (1981). The district court affirmed its original judgment in favor of the Tribe. Trans-Canada has again appealed on the same ground. The appeal is timely.

II

Our decision today in *Puyallup Tribe of Indians v. Port of Tacoma,* ____F.2d ____(9th Cir. 1983), establishes the analytic framework for resolving the question of whether the United States conveyed to the Muckleshoot Tribe in 1874 the bed of part of the White River. In *Puyallup,* we concluded that

> where a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.

____F.2d at ____ (footnote omitted).

We reached this conclusion after a careful reading of *Montana v. United States,* 450 U.S. 544 (1981), and the cases cited therein, especially *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918), and *Skokomish Indian Tribe v. France,* 320 F.2d 205 (9th Cir. 1963). We gleaned from these cases, first, the proposition that the avoidance of hostilities arising from a tribe's inability to reach a water resource on which it depends for survival can create a "public exigency" within the meaning of *Shively v. Bowlby,* 152 U.S. 1, 48 (1893), and, second, the principle that, where such an exigency exists, the United States' clear awareness of the tribe's needs taken together with the principle of construction resolving any ambiguities in agreements with the Untied States in favor of the Indian tribes warrants the further conclusion that the Government intended to meet the tribe's needs by granting to the Indians the land and the water on which they were dependent for survival. *See Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970), *cited in Montana v. United States,* 450 U.S. at 555-556, n.5.

In this case, each of the requirements set forth in *Puyallup* (derived from *Montana v. United States*) is met.[2] First, as the district court found,

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2. *As in Puyallup,* we do not mean to imply that only where these conditions are met is a conclusion that the United States granted the bed of a navigable water to an Indian tribe justified. *See Puyallup Tribe of Indians v. Port of Tacoma,* _____ F.2d at_____ n.7 (9th Cir. 1983).

the Muckleshoot Tribe's dissatisfaction with its orginal reservation gave rise to a public exigency because, as "[t]he [Indian] agents and officers repeatedly warned[,] trouble would result unless the [Muckleshoot] Reservation was enlarged" to include one of the Tribe's traditional fisheries. The United States was clearly aware "that the focus of the Muckleshoot's world was on the rivers along which they lived . . . ." The Government knew, at least by the date of the 1874 Executive Order expanding the Muckleshoot Reservation, that the Indians "depended on watercourses, not only for food and materials, but also in their manner of self-identification, language and religious practices." Further, "Muckleshoot ancestors, placed by the United States government on a reservation along the banks of a particular river, would naturally assume that the river belonged to them for their communal use." The Government's Indian agents understood that "[t]he capture of fish was an essential source of [the Indians'] food supply . . . ." Moreover, as in *Puyallup,* the methods of fishing employed by the Muckleshoot depended on the Tribe's ability to use not only the waters in which they found fish, but also the lands beneath these waters on which they constructed their fish traps and weirs. Finally, and most importantly, unlike the situation in *Montana,* where the Crow Reservation was designated with no special regard to the fact that it included a section of the Big Horn River, the Muckleshoot Reservation was expanded at the insistence of the Indians specifically to include a section of the White River on which the Tribe could continue to exercise its traditional fishing lifestyle.

In light of these facts, it was proper for the district court to conclude that, in 1874 when the United States expanded the Muckleshoot Reservation to include sections of the White River, the Government intended, and the Tribe understood, the grant of an expanded reservation to include the bed of the river and its waters as well as the land along either bank.[3] *See Puyallup,* ____F.2d at____ Accordingly, the judgment of the district court is AFFIRMED.

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3. Trans-Canada does not argue on appeal that the district court erred in its decision on the issues of navigability and the nature of the changes in the river's course. We do not consider, therefore, the district court's resolution of these issue.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PUYALLUP INDIAN TRIBE,
Plaintiff-Appellee,

v.

PORT OF TACOMA,
Defendant-Appellant

No. 81-3480
D.C. No. CV 80-164-JET
OPINION

Appeal from the United States District Court
for the Western District of Washington
The Hon. Jack E. Tanner, District Judge, Presiding.

Argued and Submitted: January 4, 1983

BEFORE: BROWNING, Chief Judge, FLETCHER AND PREGERSON, Circuit Judges.

FLETCHER, Circuit Judge:

This case involves a question of title to part of the former bed of the Puyallup River. The Port of Tacoma appeals from a ruling by the district court that the Tribe received title to the riverbed by treaty in 1857 and that a river rechannelization project in 1948-50 that exposed the former riverbed was an avulsive change of the river's course which left title to the bed in the Tribe as the pre-avulsion owner. *See Puyallup Tribe of Indians v. Port of Tacoma,* 525 F.Supp. 65 (W.D. Wash. 1981). The Port further challenges the court's ruling that the State of Washington and the United States need not be joined as necessary parties. We have jurisdiction under 28 U.S.C. § 1291 (1976) and affirm.

Prior to the arrival of white settlers in the mid-nineteenth century, the Puget Sound area and the rivers that drain into it, including the Puyallup, were inhabited by Indians known as Coast Salish. In 1854, representatives of various bands and groups of these Indians entered into the Treaty of Medicine Creek with the United States. In return for a number of reservations, a guarantee of continued fishing rights, and other promises, the Indians gave up their claim to their aboriginal homeland.

One of the Indian groups that signed the Treaty of Medicine Creek was known as the Puyallup Tribe. These Indians settled on a reservation on the south side of Commencement Bay near present-day Tacoma, Washington. This site did not include access to the Puyallup River and its fishery on which the Puyallup Tribe depended. The Tribe was very dissatisfied with its reservation and agitated vigorously (and sometimes violently) for an enlargement of the reservation to include a section of the river.

The Government recognized the importance of the fishery to the Tribe as well as the importance of pacifying the Tribe to protect white settlers in the area. In 1856, following a meeting between the Government and the Tribe at Fox Island, the Government recommended an expansion of the Puyallup Reservation to include a section of the Puyallup River. On January 20, 1857, by Executive Order, President Pierce set aside certain land that encompassed a section of the Puyallup River near its mouth as an enlargement of the Puyallup Indian Reservation. *See* A. Josephy, *Now That the Buffalo's Gone* 181-85 (1982).

Over the next 100 years, most of the reservation was allotted to individual Indians and passed into individual Indian and non-Indian ownership. Since the Puyallup River was nagvigable, the allotments along the river were bounded by the ordinary high water mark of the river. The Port of Tacoma eventually took title to certain of the allotments abutting the north bank of the river.

Between 1948 and 1950, the United States Army Corps of Engineers (Army Corps) "straigthened" the Puyallup River, including the section of the river that passed through the reservation. As a result, a twelve-acre tract of the former riverbed was exposed. The Port of Tacoma was the owner of the uplands at the time of the rechannelization. It took

possession of the newly exposed riverbed. Since 1950, the Port has had possession and exercised control over the twelve acres of exposed former riverbed and has leased it to industrial tenants.

In 1980, the Puyallup Tribe filed suit claiming beneficial title to the twelve acres of exposed former riverbed. *See* 28 U.S.C. § 1362 (1976). The Tribe based its claim on the 1857 Executive Order granting to it an enlarged reservation that encompassed part of the Puyallup River. Three days before trial, the Port filed a motion based on Federal Rule of Civil Procedure 19(a), requesting that the United States and the State of Washington be joined as necessary parties. The motion was denied.

Following a bench trial, the district court ruled that (1) the 1857 Executive Order granted to the Tribe title to that part of the Puyallup River bed within the exterior boundaries of the grant; (2) no subsequent transactions had divested the Tribe of this title; (3) the 1948-50 rechannelization of the Puyallup that exposed the former riverbed was an avulsive change of the river's course under Washington law; and (4) consequently, the Tribe's title to the former riverbed was superior to that asserted by the Port of Tacoma. The Port timely appealed from the district court's judgment quieting title in the Tribe and ejecting the Port.

II

The Port first challenges the district court's refusal to join both the United States and the State of Washington as necessary parties under Federal Rule of Civil Procedure 19(a). We are not persuaded that the district court erred.

The United States, as the trustee holding legal title to all real property owned by the Tribe, obviously has an interest in this litigation and it will not be bound by any decree ensuing from this litigation unless it is formally joined as a party. *Fort Mojave Tribe v. LaFollette,* 478 F.2d 1016, 1018 (9th Cir. 1973). Absent joinder of the United States, a judgment entered in this case in favor of the Port will not necessarily render complete relief to the Port or protect the Port from inconsistent judgments. *See* Fed. R. Civ. P. 19(a). Nonetheless, the rule is clear in this Circuit and elsewhere that, in a suit by an Indian tribe to protect its interest in tribal lands, regardless of whether the United States is a necessary party under Rule 19(a), it is *not* an indispensable party in

whose absence litigation cannot proceed under Rule 19(b). *Fort Mojave Tribe,* 478 F.2d at 1017-18; *Choctaw and Chickasaw Nations v. Seitz,* 193 F.2d 456, 460-61 (10th Cir. 1951), *cert. denied,* 343 U.S. 919 (1952); *see also Oneida Indian Nation of New York v. County of Oneida,* 434 F.Supp. 527, 544-45 (N.D.N.Y. 1977) (collecting cases.[1]

We now turn to consider the Port's contention that the State of Washington is a necessary party to this proceeding. The Port assets that the State has an interest in this litigation because, upon admission of Washington to statehood in 1889, it received title to all navigable streams within its boundaries then owned by the United States. *See United States v. Ashton,* 170 F. 509, 512-13 (C.C.W.D. Wash. 1909). Thus, if the Tribe had not been granted equitable title to the Puyallup River bed by treaty or by executive order and if the 1948-50 river rechannelization were avulsive, the State, and not the Port or the Tribe, would own the exposed riverbed.

Rule 19(a) requires a district court to join an absent party if any one of three specific conditions obtains: (A) in the absence of the party complete relief cannot be granted to those persons who are already parties, Fed. R. Civ. P. 19(a) (1); (B) the absent party claims an interest relating to the action and is so situated that disposition in his absence may "as a practical matter" impair the absent party's ability to protect that interest, *id.* at 19(a) (2) (i); or (C) the absent party claims an interest relating to the action and is so situated that disposition in his absence may subject a joined party to an inconsistent obligation, *id.* at 19(a) (2)

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1. Minnesota v. United States, 305 U.S. 382, 386-88 (1939), and *Carlson v. Tulalip Tribes of Wash.,* 510 F.2d 1337, 1339 (9th Cir. 1975), do not hold otherwise. In both *Minnesota* and *Tulalip Tribes,* the litigation was instituted by non-Indians for the purpose of effecting the alienation of tribal or restricted lands, not by individual Indians or a tribe seeking to protect Indian land from alienation. *See Oneida Nation,* 434 F.Supp. at 545 (distinguishing cases). Whether the Tribe is the plaintiff or the defendant in any given suit would not seem particularly relevant in a joinder decision under Rule 19(b), according to the factors set forth in the rule. We do not question, however, the distinction established in our circuit by the *Fort Mojave* and *Tulalip Tribes* cases for determining indispensability under Rule 19(b).

(ii).[2] The "appropriate focus" in determining whether one or more of these conditions exist is on the "practical ramifications of joinder versus nonjoinder." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1042 & n.14a (9th Cir. 1983). The district court's Rule 19(a) decision will not be reversed absent a showing of abuse of discretion. *Id.* at 1043.

The Port does not specify the particular Rule 19(a) ground upon which it relies. We do not find the State a necessary party under any of the rule's criteria.

Rule 19(a) (1) would require joinder of the State if the court could not otherwise grant "complete relief" to those already parties. *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee,* 662 F.2d 534, 537 (9th Cir. 1981). The essence of an action in ejectment, which this case is, is to settle title between the adverse claimant and the party in possession. The district court can therefore provide complete relief to the parties to this action without joining other parties who might also claim an interest in the same land. Accordingly, Rule 19(a) (1) does not require joinder of the State in this ejectment action, event though the State might in the future challenge the title of the Tribe or the Port to the riverbed.

Rule 19(a) (2) (i) seeks to prevent the results of litigation before the court from impairing the legal interest of an absent party. Since the State can assert any interest in might have in another action,[3] no legal interest

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2. Rule 19(a) provides in pertinent part:

Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

3. The State could suffer immediate practical impairment of its interests if, for instance, it were the Port's lessor but was not itself in possession of the riverbed. *See Washington v. United States,* 87 F.2d 421, 428-31 (9th Cir. 1936). Here, however, where neither the

it may have in the riverbed is impaired, regardless of the outcome of this action.[4]

Rule 19(a) (2) (ii) requires joinder to protect a party to the suit from inconsistent obligations by reason of a claimed interest of an absent party. Since the Tribe does not challenge the denial of the Rule 19(a) motion, we need reverse only if it is necessary to protect the Port's legal interests. We see no way in which the outcome of this ejectment action could possibly subject the Port to inconsistent obligations under two conflicting judgments.

A judgment adverse to the Tribe, based on a conclusion that the Tribe never received title to the bed, would not be inconsistent with a subsequent declaration requiring the Port to remove itself in favor of the state. A determination in some later suit between the State and the Port that the State's title is superior to that of the port, based perhaps on a conclusion that the 1948-50 rechannelization of the Puyallup was avulsive and not accretive, would simply not be inconsistent with a determination here that the Port's title was superior to that of the Tribe.

Footnote 3 (con't)

State itself nor any lessee of the State is asserted to be in possession of the riverbed, no practical impairment of the State's interests can result from an adjudication of who, between the Tribe and the Port, shall have possession of the riverbed.

4. *McShan v. Sherrill,* 283 F.2d 462, 463-64 (9th Cir. 1960), in which we held that landowners asserting a claim to property that was the subject of part of a quiet title action were parties who should have been joined, does not require a contrary conclusion. First, in *McShan,* record title to the land at issue was in the absentees. Hence, *any* ajudication in their absence would "place [] a cloud upon the title of the absent landowner." 283 F.2d at 463. By contrast, in the ejectment action before us, a determination of the right to possession between the Port and the Tribe will not, in any practical sense, place any cloud on any title the State might have, since in any event record title to the property is not in the State. More significantly, while the *McShan* absentees had paid "all taxes" on the property, presumably on the assumption that they in fact owned the property, there is no indication here that the State has incurred any economic detriment in reliance on any purported right of ownership of the riverbed. For this reason as well, we conclude that the possible practical effects of this litigation on the State's interests are of an entirely different order from that of those requiring joinder in *McShan.*

Nor would a conclusion in this case that the Tribe could not eject the Port from possession of the riverbed because the 1948-50 rechannelization was accretive subject the Port to the possibility of inconsistent obligations. As a "practical" matter, the Port now has possession of the riverbed and will retain possession if it prevails in this litigation. Even if it is determined in a subsequent suit between the State and the Port that the Tribe did not receive title to the exposed riverbed, that the rechannelization was avulsive, and thus that the State has title to the bed, the Port will thereby incur no inconsistent obligations. That it must remove itself in favor of the State is not an obligation inconcistent with a finding that it need not relinquish possession to the Tribe.

If the Tribe prevails, the Port may be ejected and may be contractually liable to its lessees for damages resulting from the ejectment. Such obligations would not be affected by a subsequent determination that the State has superior title to the Tribe. In any event, the Port would never again be entitled to possession.[5]

For these reasons, we conclude that the district court did not abuse its discreton in refusing to join the State of Washington or the United States as a party to this action.

III

We now turn to the merits. The Port challenges, on two dintinct grounds, the judgment of the district court ejecting the Port and quieting title to a portion of the former riverbed in the Tribe. First, it asserts that the United States did not convey title to the bed of the Puyallup River to the Puyallup Tribe either by treaty or by executive order. It contends that the Tribe lost whatever title it did have to the former bed when the river rechannelization project exposed the bed.

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5. If the Port were to attempt to eject the State after the latter had ejected the Tribe, asserting that the rechannelization was accretive, the Port would meet a collateral estoppel defense based on the necessary finding here that the rechannelization was avulsive.

A

Appellant, citing *Montana v. United States*, 450 U.S. 544 (1981), argues that the district court erred as a matter of law in concluding that the United States conveyed title to the bed of the Puyallup River to the Puyallup Tribe. Appellee counters that the district court's conclusion on this issue of the riverbed ownership is in accord with the Supreme Court's decision in *Montana v. United States* and that the district court's decision is supported by findings of fact which are not clearly erroneous. We agree with both parties to the extent that we find *Montana v. United States* controlling on the question of riverbed ownership. Accordingly, our analysis of the Tribe's claim of ownership of part of the former bed of the Puyallup River must begin with a close examination of the *Montana* decision.

In *Montana v. United States*, the Supreme Court considered a tribe's claim of title to the bed of a navigable river as it flowed through the tribe's reservation. 450 U.S. at 550-57. The Court's analysis of this issue starts from the premise that "[a] court deciding a question of title to the bed of a navigable water must . . . begin with a strong presumption against conveyance by the United States, . . . and must not infer such conveyance 'unless the intention was definitely declared or otherwise made very plain.' " *Id.* at 552 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)). At the same time, the Court did not reject the analysis of *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), in which the "Court did construe a reservation grant as including the bed of a navigable water." *See Montana*, 450 U.S. at 555-56 n.5. Nor did it gainsay the equally important proposition set forth in *Choctaw Nation* that "treaties with the Indians must be interpreted as they would have understood them, . . . and any doubtful expressions in them should be resolved in the Indians' favor." 397 U.S. at 631.[6] Thus, when faced with a claim by an Indian tribe that it owns the bed of a navigable stream that flows through its reservation, we must accord appropriate weight to both

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6. This principle of treaty construction applies in equal force to statutes passed for the benefit of Indians, *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918), and to executive orders, *Moore v. United States*, 157 F.2d 760, 762 (9th Cir. 1946); *see Skokomish Indian Tribe v. France*, 320 F.2d 205, 207-08 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964).

the principle of construction favoring Indians and the presumption that the United States will not ordinarily convey title to the bed of a navigable river. *See Confederated Salish and Kootenai Tribes v. Namen,* 665 F.2d 951, 961-62 (9th Cir.), *cert. denied,* 103 S. Ct. 314 (1982).

The Supreme Court's opinion in *Montana* provides considerable guidance as to how a court can give proper effect to both the presumption against conveyance and the principle of construction favoring Indians. First, the Court recognized that "establishment of an Indian reservation can be an 'appropriate public purpose' within the meaning of *Shively v. Bowlby,* 152 U.S. [1, 48 (1894)], justifying a congressional conveyance of a riverbed . . . ." 450 U.S. at 556. However, the Court also cautioned that "[t]he mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance." *Id.* at 554. The Court cited two cases, apparently to illustrate proper resolutions in the face of the competing principles: *Alaska Pacific Fisheries v. United States* and *Skokomish Indian Tribe v. France. See id.* at 556.

In *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918), the Court was called on to decide whether a grant by Congress of "the body of lands known as Annette Islands" to the Metlakahtla Indians included the submerged lands surrounding and between the islands. The court reviewed the history of the Annette Island Reservation and the Indian community and found:

> The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation.

Id. at 89. Accordingly, the Court concluded that not only was Congress aware of the Indians' reliance on the adjacent fishing grounds but also, in view of the importance of fishing to the Indians,

> Congress . . . did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is

> known as Annette Islands . . . embracing the intervening and surrounding waters as well as the upland . . . .

Id.

In *Skokomish Indian Tribe v. France,* 320 F.2d 205 (9th Cir. 1963), this court found that an Executive Order granting certain sections of land along the Hood Canal to the Skokomish Indians did not include a grant to the Tribe of tidelands below the ordinary high water mark. *Id. 210. The dispositive factor in construing the Executive Order to* at exclude a grant of the tidelands was the fact that the Tribe did not rely on the particular tidelands included in the reservation as an important source of food.

> The use of the tidelands by the Indian tribe, as disclosed by the evidence, does not support appellant's contention that the tidelands were essential to the Indians' livelihood and that the Indians accordingly must have understood they were to have the tidelands.
>
> . . . .
>
> It is true that shellfish and other forms of sea life were gathered by the Skokomish along the canal . . . . "[T]he usual locations at which shellfish were procured were miles from the reservation and were reached by canoe travel on Hood Canal"; and . . . "the tidelands in issue, particularly in Section 26, are not and were not a source of native shellfish in usuable quantities."

Id. at 210-11.

From the facts of *Skokomish Tribe* and *Alaska Pacific Fisheries,* we conclude that where a grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.[7] In such a situation,

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7. We do not mean to suggest that this is the only circumstance in which the United States may be found to have granted the bed of a navigable water to an Indian tribe, but

the Government's awareness of the importance of the water resource to the Tribe taken together with the principle of construction resolving ambiguities in transactions in favor of the Indians warrants the conclusion that the intention to convey title to the waters and lands under them to the Tribe is "otherwise made very plain" within the meaning of *Holt State Bank*, 270 U.S. at 55, *quoted in Montana*, 450 U.S. at 552.

This conclusion is confirmed by the penultimate paragraph of that section of the *Montana* decision dealing with the question of title to the Big Horn River bed:

> Moreover, even though the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby*, 152 U.S., at 48, justifying a congressional conveyance of a riverbed, see, *e.g., Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 85, the situation of the Crow Indians at the time of the treaties presented no "public exigency" which would have required congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. See *Shively v. Bowlby, supra*, at 48. *As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life.* 1 App. 74. Cf., *Alaska Pacific Fisheries v. United States, supra*, at 88; *Skokomish Indian Tribe v. France*, 320 F.2d 205, 212 (CA0).

450 U.S. at 556 (emphasis added); *see also id.* at 570 (Blackmun, J., disssenting in part) (accepting majority's analysis, but concluding that there was a "public exigency" requiring Congress to convey bed of Big Horn River to tribe, since, *inter alia*, fishing was important to the Crow Tribe). Further, the recent Ninth Circuit decision in *Confederated Salish and Kootenai Tribes v. Namen* supports the conclusion that title to land submerged under navigable waters may pass to the tribe whose reservation encompasses the navigable water where that tribe is

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Footnote 7 (cont.)

it is certainly one of the clearest. See Confederated Salish and Kootenai Tribes v. Name, 665 F.2d 951, 961-62 (9th Cir.), *cert. denied*, 103 S. Ct. 314 (1982).

dependent on the water's resources for survival. 665 F.2d at 962 (the importance of fishing to the Kootenai Tribe cited as one of several factors distinguising *Namen* from *Montana*.)

In order to apply the teaching of *Montana* to the case before us, we review briefly those facts relevant to a determination of whether the United States made plain its intention to convey to the Puyallup Indians that portion of the Puyallup River bed that runs through their reservation. The Puyallup Tribe was one of the signatory tribes to the 1854 Treaty. Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, 1132; *see also* A. Josephy, *Now That the Buffalo's Gone* 181-82 (1982). The Puyallup Indians have occupied the area around the Puyallup River, Commencement Bay, and surrounding parts of Southern Puget Sound since time immemorial. At the time the Tribe entered into the 1854 Treaty, its members " 'were heavily dependent upon anadromous fish for their subsistence and for trade with other tribes and later with the settlers. Anadromous fish was the great staple of their diet and livelihood. They cured and dried large quantities for year-round use, both for themselves and for others through sale, trade, barter and employment.' " *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658, 665 n.6 (1979) (quoting *United States v. Washington,* 384 F.Supp. 312, 406 (W.D. Wash. 1974)). Indeed, as the district court found, "[f]or Puyallup Indians, the fresh water courses of the area [from which they caught anadromous fish] were the center of their world and their lives . . . . Puyallup Indians conceived of their territory as the Puyallup River and the surrounding land . . . . The Puyallups' spiritual, religious and socal life centered around the river." *Puyallup Tribe of Indians v. Port of Tacoma,* 525 F.Supp. at 71. Governor Issac Stevens, who was primarily responsible for negotiating the Treaty of Medicine Creek with the Indians on behalf of the United States, was aware of the importance of the fisheries to the Indians. *Fishing Vessel Association,* 443 U.S. at 66. Nonetheless, the original treaty of 1854 granted the Puyallups a reservation removed from their river without ready access to their traditional fishing and village sites. In return for this unsuitable reservation, the Tribe relinquished its interest in its lands around Puget Sound so that the area could be opened for white settlement. *See generally* A. Josephy, *Now That the Buffalo's Gone* 181-85 (1982).

Needless to say, the Puyallups quickly recognized the inadequacy of their original reservation. As the district court found:

> Soon after the [1854] Treaty was signed, fighting broke out between Indians and non-Indians in the area, resulting in the deaths of many non-Indian settlers. Among the causes of those hostilities was the inadequacy of the area set aside as the Puyallup Reservation. One of the shortcomings of the Reservation was that it did not include the Tribe's traditional fishing areas and villages along the Puyallup River.

Puyallup Tribe of Indians v. Port of Tacoma, 525 F.Supp. at 72. The district court went on to find, based on expert testimony and documentary evidence, the following facts of particular importance to the question of riverbed ownership raised in the instance case:

> The United States sought to end . . . hostilities and gain peace [with the Puyallup and other Indians] by convening the Fox Island Council. The United States representatives expressed their awareness that the cause of the hostilities was the inadequacy of the Puyallup Reservation. Governor Stevens reminded the Indians that he had promised to modify the treaty reservations if they were unsuitable . . . .
>
> Stevens recognized and emphasized the importance of the Puyallup River when he spoke of the location of the expanded reservation.
>
> > You shall have a large Res. at Nisqually, one large Res. on the Puyaloop [sic] . . . . Now my children do you want a Res. on the Nisqually and one on the Puyaloop [sic], I will send word to the Great Father if you want Res. at those places.
>
> The Indians at the [Fox Island] Council also stressed the importance of the river, with such statements as:
>
> > I know that my people all want to live on the Puyallup [Stanop-se, a Puyallup].
>
> and
>
> > I am glad my people are going to have a Res. on the Puyallup. That is my home [Old Simon, a Puyallup].

> . . . . .
>
> The parties at the Fox Island Council thus agreed to expand the Puyallup Reservation to include the lower portion of the Puyallup River. The Commissioner of Indian Affairs and Secretary of Interior recommended that the agreement be adopted. President Pierce approved those recommendations in an Executive Order of January 20, 1857. Those recommendations show that the reservation was expanded pursuant to Article 1 of the Treaty of Medicine Creek. The expanded reservation included the property involved in this case.

Id. It is in light of these pertinent facts that we must apply *Montana v. United States.*[8]

The findings of the district court support the conclusion that the 1857 Executive Order was a response to a public exigency — avoiding hostilities between the Indians and settlers so that the Puget Sound area could be opened safely for settlement. *See United States v. Montana,* 450 U.S. at 556 (citing *Shively v. Bowlby,* 152 U.S. at 48).[9] The intention to convey title to the riverbed to the Puyallup Tribe was made very plain by the negotiations between Governor Stevens and the Tribe at Fox Island. First, as in *Alaska Pacific Fisheries,* it was important to the Indians who met at Fox Island to have dominion not only over the water but also over the land submerged beneath the water. *Compare Alaska Pacific Fisheries,* 248 U.S. at 87-90 (Indians sought to control non-Indian fish-trap built on submerged lands near the shore of the Annette Islands) *with Puyallup Tribe of Indians v. Port of Tacoma,* 525 F.Supp. 65, 71 (W.D. Wash. 1981) (Puyallup harvested fish ith wiers and traps, "substantial structures which spanned the width of the river

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8. The district court's findings of fact, quoted above, are not clearly erroneous. For the most part, the district court relied on the expert testimony of Dr. Barbara Lane as the basis for its findings with respect to the historical facts surrounding the Treaty of Medicine Creek, the Fox Island Council, the United States' interest in those proceedings, and the way of life and understanding that the Puyallup Tribe brought to the negotiations with the United States. Dr. Lane's expertise in this area was recognized in *United State v. Washington,* 384 F.Supp. 312, 350 (W.D. Wash. 1974), and the Port has offered no reason to doubt the reliability of her testimony.

9. The Tribe does not contend that the 1854 Treaty of Medicine Creek conveyed title to the bed of the Puyallup River to it. Rather, it relies on the 1857 Executive Order, which expanded the reservation under the terms of the Treaty, as the conveying agreement.

[and] were firmly implanted in the bed of the river"). Second, and more important, unlike the situation in *Montana,* where the Crow Reservation was designated without special regard to the fact that it included a section of the Big Horn River, the Puyallup Reservation, at the insistence of the Indians, was enlarged specifically to include a segment of the Puyallup River.

The appellant does not seriously argue that the Puyallups would have understood the 1857 grant of land in any way other than as a conveyance to them of a section of the Puyallup River. Accordingly, we hold that there is sufficient evidence in this case of an intent to convey lands beneath navigable waters to the Tribe to support its claim of beneficial ownership of the former Puyallup River bed. *See United States v. Aranson,* 696 F.2d 654, 664-66 (9th Cir. 1983). The district court's decision on this point is therefore affirmed.[10]

B

The Port further contends that, even if the 1857 Executive Order granted title to the riverbed to the Tribe, the rechannelization of the riverbed in 1948-50 shifted title to the bed to the Port, the owner of the uplands adjoining the pre-channelization riverbed. By contrast, the Tribe argues that the district court properly concluded that the change in the location of the river resulting from the rechannelization by the Army Corps was "avulsive" under Washington property law and thereby left

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10. The Port's further agruments against the conclusion that the Tribe received title to the bed of the Puyallup River in 1857 are meritless. The appellee, Puyallup Tribe, is the successor to the tribe that received title to the river in 1857. *See Puyallup Tribe v. Department of Game of Washington,* 433 U.S. 165, 169 n.7 (1977) (*Puyallup III*); F. Cohen, *Handbook of Federal Indian Law* 6 (1982 ed.). An Executive Order may convey title to land to an Indian tribe as effectively as any other conveyance from the United States. *See* F. Cohen, *supra,* at 472, 493-97 ("Generally, property rights in executive order reservations are similar to those in reservations created pursuant to treaty or statute . . . .").

Finally, the Port of Tacoma asserts that footnote 12 in *Puyallup III* bars the conclusion that the Tribe holds title to any part of the former Puyallup River bed. But as the Supreme Court acknowledged in that footnote, a claim of riverbed ownership was not even raised in *Puyallup III* and hence could not have been decided by the Court.

title to the riverbed in the Tribe, the party who owned the property immediately prior to the rechannelization. We conclude that the Tribe has the better position.[11]

The Puyallup River was navigable at the time allotments to the predecessors in title to the Port were made. Since grants of property bounded by a navigable river are deemed to be bounded by the ordinary high water mark of that river, *see Montana Power Co. v. Rochester,* 127 F.2d 189, 192 (9th Cir. 1942), the district court correctly ruled that the allotments of land adjoining the river made by the United States, on behalf of the Tribe, to the predecessors in title of the Port were bounded by the ordinary high water mark of the Puyallup River. *See* 525 F.Supp. at 76. Thus, after the allotments were made, the Tribe continued to have title to the riverbed of the Puyallup River within the reservation bounded on each side by the ordinary high water marks of the river.

For this reason, the common boundary of the properties to which the Port and the Tribe had title in 1948 was defined by the ordinary high water mark of the Puyallup River.[12] Consequently, we must consider whether the movement of the Puyallup River in 1948-1950 was an "avulsive" or an "accretive" change under Washington law. If the rechannelization were avulsive, title to the bed is in the Tribe. If accretive, the title to at least some, if not all, of the riverbed now lies in

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11. Under *Wilson v. Omaha Indian Tribes,* 442 U.S. 653, 671 & n.8, 676 (1979); the question of ownership of land that is allegedly part of an Indian reservation and has allegedly never been conveyed away by the United States of by the Tribe is an issue of federal law to be settled by reference to local law. *See United States v. Aranson,* 696 F.2d 654, 658 (9th Cir. 1983). Hence, Washington property law rules are incorporated into federal law to determine whether the Tribe now has title to the riverbed.

12. The Port does not challenge the district court's conclusion that all changes in the configuration of the Puyallup River from the date allotments were first made in 1886 up to the date of rechannelization were accretive changes under Washington law. *See* 525 F.Supp. at 76-77. The common boundary of the riverbed and the alotted property therefore changed over the years between 1886 and 1948 to conform to the actual ordinary high water mark of the river. Thus, in 1948, immediately prior to the rechannelization, the Tribe had title to the riverbed of the Puyallup, bounded by the ordinary high water marks of the river as they then lay. *See Ghione v. Washington,* 26 Wash. 2d 635, 650, 175 P.2d 955, 962 (1946) (where bank of river forms boundary of two estates, the boundary changes with accretive changes in river bank).

the Port as upland owner on one side of the bed, and the Tribe would have no basis for ejecting the Port.[13]

Several Wahsington cases make clear that whether a change in a physical aspect of a river is avulsive under Washington law depends on the *suddenness* and the *size* of the change. Where the change is both sudden and significant, the change is avulsive and the real estate boundaries dependent on the physical aspect of the water course are deemed fixed from that point onward as they were in fact immediately before the avulsive change took place.

In *Ghione v. State,* 26 Wash. 2d 635, 650, 175 P.2d 955, 962 (1946), for example, the Washington Supreme Court held that where a navigable riverbed had shifted by "a slow and continuous process," the boundary between the upland owner and the riverbed owner, defined as the ordinary high water mark of the river in the original grant, shifted along with the actual ordinary high water mark of the river. *See id.* (citing cases). Similarly, in *Harper v. Holston,* 119 Wash. 436, 443, 205 P. 1062, 1064 (1922), the court held that where the actual meander line of a non-navigable stream had not moved by any "sudden or violent changes," the boundary of a tract described as the meander line of the stream was in accordance with the actual meander line.

By contrast, in *Parker v. Farrell,* 74 Wash.2d 553, 555-56, 445 P.2d 620, 622-23 91968), the court held that where a "log jam" caused a river to "suddenly change [] its flow" and to move 500 feet to the south, the boundary of a tract defined as the thread of the river remained at the

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13. The accretion/avulsion principle of Washington real property law is an interpretive rule used in construing the terms of a grant describing the boundaries of real estate in words relating to a physical aspect of a river, e.g., a river's "ordinarily high water mark," or its "thread." The rule is based largely on the implied if not actual concerns of the owners of real estate.

The Washington Supreme Court has summarized the principle as follows:

> When the course of the stream changes, the boundary line may or may not shift with the stream. If the change is slow and imperceptible so that it may be classified as accretion or reliction, the boundary line shifts. If, however, the change of the stream is the original boundary line remains.

Parker v. Farrel, 74 Wash.2d 553, 554-55, 445 P.2d 620 622 (1968) (footnote omitted).

location where the thread of the river had been immediately before the change. Likewise, in *Ghione,* the court held that where a riverbed dried up as the result of a project of a commercial waterway district, the change was avulsive and left ownership of the former riverbed, now dry, in the party who had owned the riverbed when submerged. 26 Wash 2d at 651, 659-60, 175 P.2d at 962, 965.

The district court did not specifically find that the change in the configuration of the Puyallup during the rechannelization project in 1948-50 was sudden and significant. Rather, the court simply determined that the Army Corp had in fact "removed the river from its channel . . . and relocated it in the artificially constructed channel, leaving the property exposed as upland on the bank of the river." 525 F.Supp. at 73-74. Nevertheless, the record nowhere indicates, nor does the Port argue, that the movement of the river southward by at least half its width in a period of less than two years was not in fact sudden and significant as opposed to gradual and imperceptible. Under the principles set forth by the Washington Supreme Court, the change in the banks of the river resulting from the Army Corp project falls squarely within the category of avulsive changes. Consequently, we conclude that the district court correctly ruled that the Tribe holds title to the Puyallup riverbed as it existed immediately before the 1948-50 change.

The Port argues strenuously that, even if the 1948-50 change should ordinarily by treated as avulsive, *Strom v. Sheldon,* 12 Wash. App. 66, 527 P.2d 1382 (1974), requires a finding that the riverbed accreted to the property of the Port, the pre-change upland owner. This contention is meritless.

In *Strom,* one of the two landowners whose properties were bounded by the "thread" of a stream dredged the stream, moving the stream onto his property, and thereby left the former thread of the stream on dry land. *Id.* at 1383. As a result, the lot line of the non-dredging neighbor would have terminated far short of the river if the avulsive change rule were applied. *Id.* While assuming that the change in the river flow was in fact avulsive, the *Strom* court invoked a theory of "equitable treatment" first described by the Washington Supreme Court in an earlier case involving lakeshore navigation rights and refused to hold that the boundary line between the two property owners remained at the thread of the river immediately before the assumedly avulsive

dredging. *Id.* at 1384-86. Emphasizing that it was the "defendants' predecessor himself who caused the shift in the course" of the river and that to apply the avulsive rule would deprive the plaintiffs of a "valuable riparian interest," *id.* at 1386, the court ruled that the boundary line shifted along with the actual meander line of the stream, despite the avulsive change.

We do not read the decision of the Washington court of appeals in *Strom* to effect a radical abandonment of the well-settled principles governing real estate boundaries defined by physical aspects of watercourses in favor of a system of ad hoc determinations based on "equitable treatment" of the parties of all cases in which the allegedly avulsive change was the product of human as opposed to natural activity. To do so would be to ignore the decision of the Washington Supreme Court in *Ghione v. State,* where the court held that a change in the configuration of a river resulting from a commercial waterway project was avulsive. *See* 26 Wash. 2d 635, 655, 659-60, 175 P.2d 955, 965 (1946).

Rather, we construe *Strom* to carve out a limited exception where (1) one of the two conflicting landowners has in fact caused the river change which would otherwise be characterized as avulsive *and* (2) the other landowner would be deprived of river access by such a characterization. This is the more natural reading of the court's repeated emphasis in *Strom* of the fact that it was the acts of the defendants' own predecessor that caused the allegedly avulsive change. Since the Tribe was not responsible for the rechannelization, the special principle of "equitable treatment" epoused in *Strom* is inapplicable. The ordinary avulsive change rule fully applies.[14]

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14. The Port also contends that the district court abused its discretion in not certifying to the Washington Supreme Court the question of whether the change caused by the rechannelization of the Puyallup River was avulsive or accretive. *See Lehman Brothers v. Schein.* 416 U.S. 386, 390-91 (1974). This contention is meritless. Whatever further clarity certification would have provided, since the Washington law is rather well-defined, the trial judge's refusal to certify was not an abuse of discretion.

IV

For the reasons set forth above, we affirm the district court's ruling that the State of Washington and the United States need not be joined. We further affirm its well-considered determination that the Executive Order of 1857 granted title to the riverbed to the Tribe and that the rechannelization resulted in an avulsive change in the Puyallup River, fixing the boundaries of the riverbed property owned by the Tribe by the location of the ordinary high water marks of the river immediately before the relocation of the river.

AFFIRMED.

APPENDIX C

TREATY WITH NISQUALLYS &c. DEC. 26, 1854.

FRANKLIN PIERCE,

Dec. 26, 1854.

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit: —

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point

Southworth, on the western side of Admiralty Inlet; thence round the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured for them.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together the the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands; *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty

dollars; for the next two years, three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may required, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, as his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorilyproved before the agent, the property taken shall be returned, or in default thereof, if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and, therefore, it is provided, that any Indian belong to said tribes, who is guity of bringing liquor into said reservations, or who drinks liquor, may have his or her proprotion of any annutities withheld from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or intstuctors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, [L.S.]

Governor and Superintendent Territory of Washington.

QUI-EE-METL,	his x mark, [L.S.]
SNO-HO-DUMSET,	his x mark, [L.S.]
LESH-HIGH,	his x mark, [L.S.]
SLIP-O-ELM,	his x mark, [L.S.]
KWI-ATS,	his x mark, [L.S.]
STEE-HIGH,	his x mark, [L.S.]
DI-A-KEH,	his x mark, [L.S.]
HI-TEN,	his x mark, [L.S.]
SQUA-TA-HUN,	his x mark, [L.S.]
KAHK-TSE-MIN,	his x mark, [L.S.]
SONAN-O-YUTL,	his x mark, [L.S.]
KL-TEHP,	his x mark, [L.S.]
SAHL-KI-MIN,	his x mark, [L.S.]
T'BET-STE-HEH-BIT,	his x mark, [L.S.]
TCHA-HOOS-TAN,	his x mark, [L.S.]
KE-CHA-HAT,	his x mark, [L.S.]
SPEE-PEH,	his x mark, [L.S.]
SWE-YAH-TUM,	his x mark, [L.S.]
CHAH-ACHSH,	his x mark, [L.S.]
PICH-KEHD,	his x mark, [L.S.]

S'KLAH-O-SUM,	his x mark, [L.S.]
SAH-LE-TATL,	his x mark, [L.S.]
SEE-LUP,	his x mark, [L.S.]
E-LA-KAH-KA,	his x mark, [L.S.]
SLUG-YEH,	his x mark, [L.S.]
HI-NUK,	his x mark, [L.S.]
MA-MO-NISH,	his x mark, [L.S.]
CHEELS,	his x mark, [L.S.]
KNUTCANU,	his x mark, [L.S.]
BATS-TA-KOBE,	his x mark, [L.S.]
WIN-NI-YA,	his x mark, [L.S.]
KLO-OUT,	his x mark, [L.S.]
SE-UCH-KA-NAM,	his x mark, [L.S.]
SKE-MAH-KAN,	his x mark, [L.S.]
WUTS-UN-A-PUM,	his x mark, [L.S.]
QUUTS-A-TADM,	his x mark, [L.S.]
QUUT-A-HEH-MTSN,	his x mark, [L.S.]
YAH-LEH-CHN,	his x mark, [L.S.]
TO-LAHL-KUT,	his x mark, [L.S.]
YUL-LOUT,	his x mark, [L.S.]
SEE-AHTS-OOT-SOOT,	his x mark, [L.S.]
YE-TAHKO,	his x mark, [L.S.]
WE-PO-IT-EE,	his x mark, [L.S.]
KAH-SLD,	his x mark, [L.S.]
LA'H-HOM-KAN,	his x mark, [L.S.]
PAH-HOW-AT-ISH,	his x mark, [L.S.]
SWE-YEHM,	his x mark, [L.S.]
SAH-HWILL,	his x mark, [L.S.]
SE-KWAHT,	his x mark, [L.S.]
KAH-HUM-KLT,	his x mark, [L.S.]
YAH-KWO-BAH,	his x mark, [L.S.]
WUT-SAH-LE-WUN,	his x mark, [L.S.]
SAH-BA-HAT,	his x mark, [L.S.]
TEL-E-KISH,	his x mark, [L.S.]
SWE-KEH-NAM,	his x mark, [L.S.]
SIT-OO-AH,	his x mark, [L.S.]
KO-QUEL-A-CUT,	his x mark, [L.S.]
JACK,	his x mark, [L.S.]
KEH-KISE-BE-LO,	his x mark, [L.S.]
GO-YEH-HN,	his x mark, [L.S.]
SAH-PUTSH,	his x mark, [L.S.]
WILLIAM,	his x mark, [L.S.]

Executed in the presence of us: —
M.T. SIMMONS,
Indian Agent.
JAMES DOTY,
Secretary of the Commission.
C.H. MASON,
Secretary Washington Territory.
W.A. SLAUGHTER,
1st Lieut. 4th Infantry.
JAMES McALISTER,
E. GIDDINGS, jr.,
GEORGE SHAZER,
HENRY D. COCK.
S.S. FORD, jr.,
HOHN W. McALISTER,
CLOVINGTON CUSHMAN,
PETER ANDERSON,
SAMUEL KLADY,
W.H. PULLEN,
P.O. HOUGH,
E.R. TYERALL,
GEORGE, GIBBS,
BENJ. F. SHAW, *Interpreter,*
HAZARD STEVENS.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit: —

"IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
"*March* 3, 1855.

"*Resolved,* (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steth-chass, T'Peeksin, Squi-aitl, and Saheh-wamish tribes and bands of Indians occupying the lands lying

round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands and duly authorized by them.

"Attest: ASBURY DICKINS,
"Secretary."

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

[L.S.] Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE.

By the President:
W.L. MARCY, *Secretary of State.*

APPENDIX D

TREATY WITH THE DWAMISH &c. INDIANS. JAN. 22, 1855

TREATIES

Treaty between the United States and the Dwamish, Suquamish, and other allied and subordinate Tribes of Indians in Washington Territory. Concluded at Point Elliott, Washington Territory, January 22, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.

JAMES BUCHMAN,
PRESIDENT OF THE UNITED STATES,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treay was made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty-five, by Isaac I Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States , and the hereinafter-named chiefs, headmen, and delegates of the Dwamish, Suquamish, Sk-tahl-mish, Sam-ahmish, Smalh-kahmish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluck-whamish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sah-ku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Mee-see-qua-guileh, Cho-bah-ah-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by them; which treaty is in the words and figures following to wit:

Articles of agreement and convention made and concluded at Muckl-te-oh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Dwamish, Suquamish, Sk-tahl-mish, Sam-ahmish, Smalh-kahmish, Skope-ahmish, St-kah-mish, Snoqualmoo, Skai-wha-mish, N'Quentl-ma-mish, Sk-tah-le-jum, Stoluck-whamish, Sno-ho-mish, Skagit, Kik-i-allus, Swin-a-mish, Squin-ah-mish, Sah-ku-mehu, Noo-wha-ha, Nook-wa-chah-mish, Mee-see-qua-guileh, Cho-bah-ah-bish, and other allied and subordinate tribes

and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence round the foot of Vashon's Island eastwardly and southeastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-slhk-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island call Shais-quihl, and the island call Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the

Indians being compensated for any damage thereby done them.

ARTICLE III. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of the Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territory. Provided, however, that the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

ARTICLE IV. The said tribes and bands agree to remove to and settle upon the said first above mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

ARTICLE VI. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner — that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each year; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian Affairs, or other proper officer.

shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE VII. The President may hereafter, when in his opinion the interest of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for the improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor.

ARTICLE VIII. The annuities of the aforesaid tribe and bands shall not be taken to pay the debts of individuals.

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as the prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States but to deliver them up to the authorities for trail.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proprotion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United states further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

ARTICLE XIV. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, *Governor and Superintentend,* [L.S.]

SEATTLE, Chief of the Dwamish and Suquamish tribes.
his x mark, [L.S.]

PAT-KA-NAM, *Chief of the Snoqualmoo, Snohomish and other tribes*
his x mark, [L.S.]

CHOW-ITS-HOOT, *Chief of the Lummi and other tribes.*
his x mark, [L.S.]

GOLIAH, *Chief of the Skagits and other allied tribes.*
his x mark, [L.S.]

KWALLATTUM, or General Pierce, *Sub-chief of the Skagit tribe.*
his x mark, [L.S.]

S'HOOTST-HOOT, *Sub-chief of Snohomish.* his x mark, [L.S.]

SNAH-TALC, or Bonaparte, *Sub-chief of Snohomish.*
his x mark, [L.S.]

SQUUSH-UN, or The Smoke, *Sub-chief of the Snoqualmoo.*
his x mark, [L.S.]

SEE-ALLA-PA-HAN, or The Priest, *Sub-chief of Sk-tah-le-jum.*
his x mark, [L.S.]

HE-UCH-KA-NAM, or George Bonaparte, *Sub-chief of Snohomish.*
his x mark, [L.S.]

TSE-NAH-TALC, or Joseph Bonaparte, *Sub-chief of Snohomish.*
his x mark, [L.S.]

NS'SKI-OOS, or Jackson, *Sub-chief of Snohomish.*
his x mark, [L.S.]

WATS-KA-LAH-TCHIE, or John Hobtst-hoot, *Sub-chief of Snohomish.* his x mark, [L.S.]

SMEH-MAI-HU, *Sub-chief of Skai-wha-mish* his x mark, [L.S.]

SLAT-EAH-KA-NAM, *Sub-chief of Snoqualmoo.* his x mark, [L.S.]

ST'HAU-AI, *Sub-chief of Snoqualmoo.* his x mark, [L.S.]

LUGS-KEN, *Sub-chief of Skai-wha-mish.* his x mark, [L.S.]

S'HEHT-SOOLT, or Peter, *Sub-chief of Snohomish.*
his x mark, [L.S.]

DO-QUEH-OO-SATL, *Snooqualmoo tribe.* his x mark, [L.S.]
JOHN KANAM, *Snoqualmoo sub-chief.* his x mark, [L.S.]
KLEMSH-KA-NAM, *Snoqualmoo.* his x mark, [L.S.]
TS'HUAHNTL, *Dwa-mish sub-chief.* his x mark, [L.S.]
KWUSS-KA-NAM, or George Snatelum, Sen., *Skagit tribe.* his x mark, [L.S.]
HEL-MITS, or George Snatelum, *Skagit sub-chief.* his x mark, [L.S.]
S'KWAI-KWI, *Skagit trib, sub-chief.* his x mark, [L.S.]
SHE-LEK-QU, *Sub-chief Lummi tribe.* his x mark, [L.S.]
S'H'-CHEH-OOS, or General Washington, *Sub-chief of Lummi tribe.* his x mark, [L.S.]
WHAI-LAN-HU, or Davy Crockett, *Sub-chief of Lummi tribe.* his x mark, [L.S.]
SHE-AH-DELT-HU, *Sub-chief of Lummi tribe.* his x mark, [L.S.]
KWULT-SEH, *Sub-chief of Lummi tribe.* his x mark, [L.S.]
KWULL-ET-HU, *Lummi tribe.* his x mark, [L.S.]
KLEH-KENT-SOOT, *Skagit tribe.* his x mark, [L.S.]
SOHN-HEH-OVS, *Skagit tribe.* his x mark, [L.S.]
S'DEH-AP-KAN, or General Warren, *Skagit tribe.* his x mark, [L.S.]
CHUL-WHIL-TAN, *Sub-chief of Suquamish tribe.* his x mark, [L.S.]
SHE-EH-TUM, *Skagit tribe.* his x mark, [L.S.]
PATCHKANAM, or Dome, *Skagit tribe.* his x mark, [L.S.]
SATS-KANAM, *Squin-ah-nush tribe.* his x mark, [L.S.]
SD-ZO-MAHTL, *Kik-ial-lus band.* his x mark, [L.S.]
DAHTL-DE-MIN, *Sub-chief of Sah-ku-meh-hu.* his x mark, [L.S.]
SD'ZEK-DU-NUM, *Me-sek-wi-guilse sub-chief.* his x mark, [L.S.]
NOW-A-CHAIS, *Sub-chief of Dwamish.* his x mark, [L.S.]
MIS-LO-TCHE, or Wah-hehl-tchoo, *Sub-chief of Suquamish.* his x mark, [L.S.]
SLOO-NOKSH-TAN, or Jim, *Suquamish tribe.* his x mark, [L.S.]
MOO-WHAH-LAD-HU, or Jack, *Suquamish tribe.* his x mark, [L.S.]
TOO-LEH-PLAN, *Suquamish tribe.* his x mark, [L.S.]
HA-SEH-DOO-AN, or Keo-kuck, *Dwamish tribe.* his x mark, [L.S.]
HOOVILT-MEH-TUM, *Sub-chief of Suquamish.* his x mark, [L.S.]
WE-AI-PAH, *Skaiwhamish tribe.* his x mark, [L.S.]
S'AH-AN-HU, or Hallam, *Snohomish tribe.* his x mark, [L.S.]
SHE-HOPE, or General Pierce, *Skagit tribe.* his x mark, [L.S.]

HWN-LAH-LAKQ, or Thomas Jefferson, *Lummi tribe.*
his x mark, [L.S.]

CHT-SIMPT, *Lummi tribe.* his x mark, [L.S.]
TSE-SUM-TEN, *Lummi tribe.* his x mark, [L.S.]
KLT-HAHL-TEN, *Lummi tribe.* his x mark, [L.S.]
KUT-TA-KANAM, or John, *Lummi tribe.* his x mark, [L.S.]
CH-LAH-BEN, *Noo-qua-cha-mish band.* his x mark, [L.S.]
NOO-HEH-OOS, *Snoqualmoo tribe.* his x mark, [L.S.]
HWEH-UK, *Snoqualmoo tribe.* his x mark, [L.S.]
PEH-NUS, *Skai-whamish tribe.* his x mark, [L.S.]
YIM-KA-NAM, *Snoqualmoo tribe.* his x mark, [L.S.]
TWOOI-AS-KUT, *Skaiwhamish tribe.* his x mark, [L.S.]
LUCH-AL-KANAM, *Snoqualmoo tribe.* his x mark, [L.S.]
S'HOOT-KANAM, *Snoqualmoo tribe.* his x mark, [L.S.]
SME-A-KANAM, *Snoqualmoo tribe.* his x mark, [L.S.]
SAD-ZIS-KEH, *Snoqualmoo.* his x mark, [L.S.]
HEH-MAHL, *Skaiwhamish band.* his x mark, [L.S.]
CHARLEY, *Skagit tribe.* his x mark, [L.S.]
SAMPSON, *Skagit tribe.* his x mark, [L.S.]
JOHN TAYLOR, *Snohomish tribe.* his x mark, [L.S.]
HATCH-KWENTUM, *Skagit tribe.* his x mark, [L.S.]
YO-I-KUM, *Skagit tribe.* his x mark, [L.S.]
T'KWA-MA-HAN, *Skagit tribe.* his x mark, [L.S.]
STO-DUM-KAN, *Swinamish band.* his x mark, [L.S.]
BE-LOLE, *Swinamish band.* his x mark, [L.S.]
D'ZO-LOLE-GWAH-HU, *Skagit tribe.* his x mark, [L.S.]
STEH-SHAIL, William, *Skaiwhamish band.* his x mark, [L.S.]
KEL-KAHL-TSOOT, *Swinamish tribe.* his x mark, [L.S.]
PAT-SEN, *Skagit tribe.* his x mark, [L.S.]
PAT-TEH-US, *Noo-wha-ah sub-chief.* his x mark, [L.S.]
S'HOOLK-KA-NAM, *Lummi sub-chief.* his x mark, [L.S.]
CH-LOK-SUTS, *Lummi sub-chief.* his x mark, [L.S.]

Executed in the presence of us —

M.T. SIMMONS, *Indian agent.*
C.H. MASON, *Secretary of Washington Territory.*
BENJ. F. SHAW, *Interpreter.*
CHAS. M. HITCHCOCK.
H.A. GOLDBOROUGH.
GEROGE GIBBS.
JOHN H. SCRANTON.
HENRY D. COCK.
S.S. FORD, Jr.
ORRINGTON CUSHMAN.
ELLIS BARNES.
R.S. BAILEY.
S.M. COLLINS.
LAFAYETEE BALCH.
E.S. FOWLER.
J.H. HALL.
ROB'T DAVIS.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,
"SENATE OF THE UNITED STATES, MARCH 8, 1859.

"Resolved, (two-thirds of the senators present concurring.) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen and delegates of the Dwamish, Suquamish and other allied and subordinate tribes of Indians occupying certain lands situated in Washington Territory, signed the 22d day of January, 1855.

"Attest: "ASBURY DICKINS, *Secretary"*

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April,
[SEAL.] in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

APPENDIX E

Muckleshoot Reserve.

[In Tulalip Agency, area 3 square miles.]

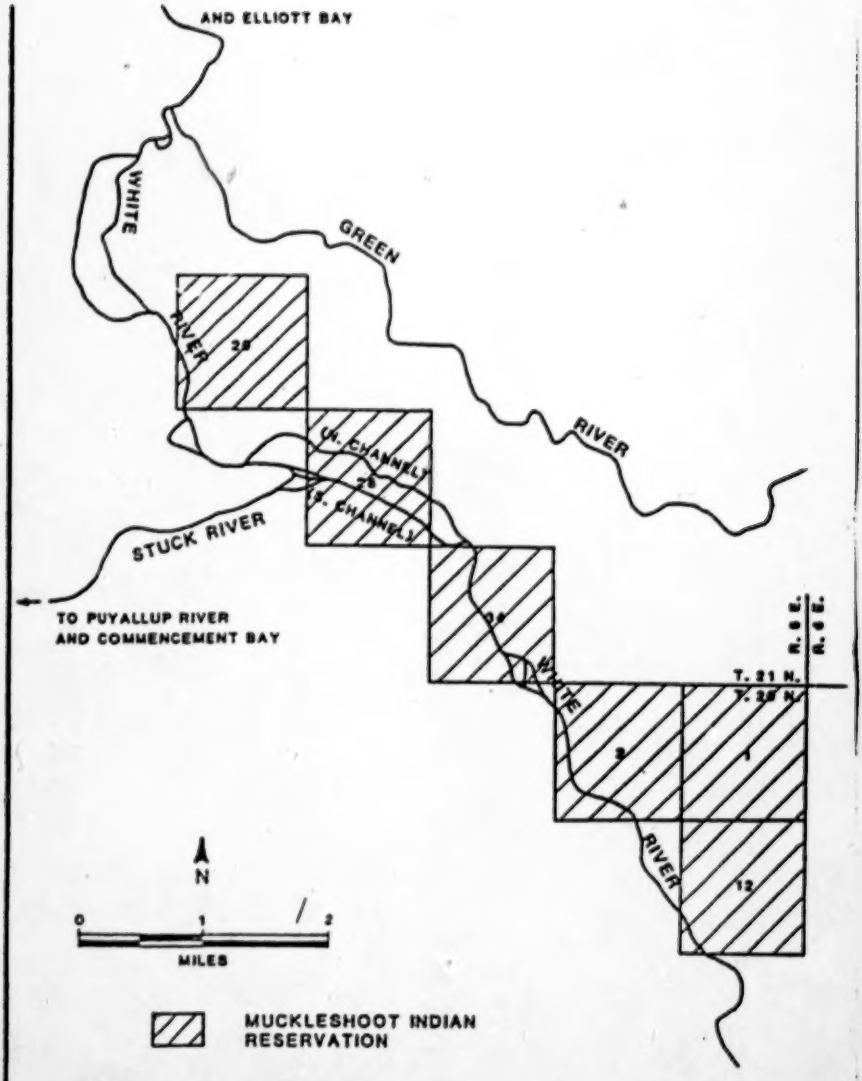
(for Executive orders of January 19 and 20, 1857, relative to Muckleshoot Reserve, see "Nisqually Reserve." below.)

EXECUTIVE MANSION, *April 9, 1874.*

It is hereby ordered that the following tracts of land in Washington Territory, viz: Sections 2 and 12 of township 20 north, range 5 east, and sections 20, 28 and 34, of township 21 north, range 5 east, Willamette meridian, be withdrawn from sale or other disposition, and set apart as the Muckleshoot Indian Reservation, for the exclusive use of the Indians in that locality, the same being supplemental to the action of the Department approved by the President January 20, 1857.

U.S. GRANT

APPENDIX F



STETSON ENGINEERS INC. CIVIL AND CONSULTING ENGINEERS	RIVER POSITIONS IN VICINITY OF MUCKLESHOOT INDIAN RESERVATIO' A-3 1974

Office - Supreme Court, U.S
FILED
DEC 17 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83-833

IN THE SUPREME COURT

of the

UNITED STATES

October Term 1983

THE MUCKLESHOOT INDIAN TRIBE; AGATHA JERRY STARR; DONALD JERRY; LAWRENCE JERRY; BERT MOSES; HERMAN MOSES; CECIL MOSES; and HOWARD MOSES,
Respondents,

v.

TRANS-CANADA ENTERPRISES, LTD.; SYNERGY INTERNATIONAL, LTD.; and HERBERT GUENTHER, *Petitioners.*

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND L. DAVIS
COUNSEL OF RECORD
Suite 100, 2615 Fourth Avenue,
Seattle, Washington 98121
Telephone: (206) 292-1550

ROBERT E. RATCLIFFE
Duncan Building, Third Floor
315 Second Avenue South
Seattle, Washington 98104
Telephone: (206) 622-7050
Counsel for Petitioners

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There are no parent companies, subsidiaries or affiliates of the Petitioners except that N.B. Cook Company, a Canadian corporation, is the parent company of Trans-Canada Enterprises, Ltd.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MUCKLESHOOT INDIAN TRIBE, et al.,
Plaintiffs,

vs.

TRANS-CANADA ENTERPRISES, LTD., et al.,
Defendants.

NO. C77-909R
MEMORANDUM OPINION

The dispute between the parties in this case involves three areas of land within Section 28 of the Muckleshoot Indian Reservation as enlarged by an executive order of 1874. Two of these areas shall be referred to as the north and south channels of the White River. The third area is that portion of Government Lot 3 which, when originally conveyed by government patent to Muckleshoot Indian Jerry Dominick in 1905, was located entirely north of the White River but which now, due to the ensuing change in the river's course, lies south of the White River.

The Court must address three basic questions:

(1) When the United States enlarged the Muckleshoot Reservation by executive order in 1874, did it intend to grant the riverbeds of the north and south channels in trust to the Muckleshoot Indian Tribe for the exclusive use of the tribe as a whole?

(2) If the answer to the first question is affirmative, did the United States intend to divide up the riverbeds to the north and south channels and convey portions of the riverbeds to individual Indian families by government patents in 1905, thus divesting the tribe of its interest in the riverbeds, or did the riverbeds continue to be reserved for the tribe as a whole?

(3) What was the nature of the changes in the White River's course and what effect did those changes have on the location of the channel riverbeds and Government Lot 3?

I

Returning to the first question, did the United States intend in 1874 to grant the Muckleshoot Tribe the riverbeds of the White River in Section 28?

The Court recognizes that the executive order of 1874 enlarging the reservation did not mention the riverbeds of the White River. Nor did the United States ever explicitly express in any document an intent to grant the riverbeds to the Muckleshoot Tribe as a whole.

However, because the grantee in this case is an Indian tribe, this absence of explicit reference to riverbeds is not controlling. The United States Supreme Court only recently reaffirmed this special principle of construction in *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970).

Rather than focusing only on the explicit language of the documents involved in enlarging the Muckleshoot Reservation, the Court must determine whether, in light of the circumstances, the United States intended to grant the riverbeds. The Court must therefore examine the surrounding historical circumstances including treaty promises, the manner in which the reservation was created, the reason for choosing a particular location, and the economic and cultural dependency of the Indian tribe on access to a certain body of water. Examples of cases which have set forth and followed this standard are *Choctaw Nation, supra; Moore v. United States,* 157 F.2d 760 (9th Cir. 1946); *Donnelly v. United States,* 228 U.S. 243, 259-264 (1913); and *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 (1918). Furthermore, according to *Choctaw Nation* at 631, documents bearing on riverbed ownership within an Indian reservation should be construed on the assumption that the United States was acting for the tribe's benefit and any ambiguities are to be resolved in the tribe's favor.

Keeping in mind the above special tenets of construction and having carefully listened to the testimony and examined the exhibits submitted, the Court must conclude that the evidence overwhelmingly establishes an intent on the part of the United States to reserve the north and south

channels of the White River in Section 28 for the tribe's benefit as a whole.

In their pretrial order, the parties agreed that the Muckleshoot Indian Tribe is composed of descendants of White, Green Upper Puyallup and Duwamish River Indians, and that several important Indian settlements and fisheries of Muckleshoot ancestors were located along the White River. The parties also agree that Muckleshoot ancestors relied on rivers and streams for fishing, commerce and religious purposes, and that fishing was an integral part of their means of sustenance, social customs and religious practices. Neither do defendants contest that Muckleshoot ancestors' fishing was done on a communal basis and that their traditional fishing techniques required communal use of riverbeds.

Testimony by plaintiff Tribe's expert witness, an anthropologist with extensive knowledge of Pacific Northwest Coast Indians, coupled with supporting documentary exhibits, further laid an extremely persuasive historical basis for the Court's conclusion. Briefly summarized, the evidence reveals that through its agents in Washington Territory, the United States government was well aware during the treaty-making process and the subsequent establishment and enlargement of the Muckleshoot Reservation that the Muckleshoot ancestors were dependent on rivers to sustain themselves and their culture. But contrary to the Government's treaty promises and Governor Isaac Steven's promise that the Muckleshoot ancestors would be located on a reservation between the White and Green Rivers, the 1857 Muckleshoot Reservation was situated on a prairie without access to any river or fishery.

Correspondence and historical evidence from ensuing years reveals that the Muckleshoot ancestors expressed dissatisfaction and that United States Indian agents made efforts to secure available land on the White and Green Rivers which could be added to the Reservation in fulfillment of the government's promises. The final result of these efforts was the 1874 executive order enlarging the Reservation to include land stretching for six miles on both sides of the White River. When compared to the usual compact form of Indian reservations, the elongated, checkerboard shape of the enlargement can leave no doubt that its purpose was to provide the Muckleshoot ancestors with access to the White River.

The Court is thus confronted with uncontroverted evidence of the following circumstances: The enormous importance of rivers to the Muckleshoot ancestors' economy, social organization, cultural practices and religion; their traditional communal use of rivers and riverbeds; the knowledge of the United States government that rivers and fishing were the central communal focus of Muckleshoot ancestors' lives; the government's promises that it would provide them with a reservation suitable to their needs; and the enlargement by executive order of the original, unsatisfactory Reservation to include land on both sides of the six-mile stretch of the White River. Under these circumstances, it seems clear that the United States did intend to grant the Tribe the riverbeds for their exclusive and permanent use.

II

The second question is whether, when the Unites States government assigned allotments by issuing government patents in 1905, it conveyed portions of the riverbeds in Section 28 to individual Indian assignees.

First, the court must distinguish between the north and the south channels. There is no question that the area covered by the north channel was not included in any government patents issued to individual Indians and thus remained reserved for the tribe as a whole.

As for the south channel, government patents which conveyed allotments riparian to it did include the acreage of the riverbed in the lands conveyed to individual Indians. However, the Court perceives several problems with ending the analysis at that point.

The first problem concerns the navigability of the south channel. While the parties agree that the north channel was a navigable stream, defendants maintain that the south channel was not navigable. They base this contention on the fact that the two government surveyors who conducted surveys of the White River's two channels in 1867 and 1874 meandered neither bank of the south channel, thus indicating a conclusion that it was not navigable. But, as stated in *Oklahoma v. Texas,* 258 U.S. 574, 585-586 (1922), any legal inference of navigability arising from the action of a surveyor has little significance because surveyors are not clothed with the power to settle questions of navigability. The test is instead:

> whether [the river] is used, or is susceptible to being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. 258 U.S. at 586.

The Court has reviewed the documents and expert testimony submitted on the issue of the south channel's navigability and is convinced that it was indeed a navigable stream. The evidence reveals that the south channel was used for canoe traffic and for the transportation of shingle bolts. Historical documents, transcripts from prior cases and the memories of individuals also indicate that, at least during certain portions of the White River's history, the majority of the river's water was carried in the south channel.

Therefore, because the south channel was in fact navigable, the Court must conclude that the surveys indicating otherwise were erroneous.

The general rule is that a disposition by the United States of public lands bordering on navigable waters only conveys title to the lands above the high water mark. Only where the United States has clearly expressed an intent to convey title to the riverbed of a navigable river can a Court generally find that the United States wished to divest itself of the riverbed. *Shively v. Bowlby,* 152 U.S. 1 (1894); *United States v. Finch,* 548 F.2d 822, 827-832 (9th Cir. 1976).

Given this standard requiring express intent, the Court confronts a second problem. The allotment process pursuant to which government patents were issued in 1905 was based on the surveys of the Reservation conducted in 1874 and in 1903. In 1874, Ross Shoecraft surveyed and subdivided the reservation as enlarged into forty-acre tracts in preparation for the future allotments of parcels to individual Indians. Because he meandered the right bank of the north channel, reflecting a conclusion that it was a significant stream, he excluded the north channel from the subdivided tracts riparian to it. By the same token, because he failed to meander either bank to the south channel, he did not exclude the acreage of that riverbed from riparian tracts. This method of proceeding was consistent with general surveying principles.

Then in 1903, J.J. Sheehan was commissioned to do a boundary survey of the reservation in connection with the allotment process. Apparently because his commission was limited to determining boundaries, Sheehan did not meander any banks of the White River nor did he redetermine the relationship between the subdivided tracts and the channels of the White River.

Given the Court's determination that the south channel was navigable, Shoecraft's and Sheehan's surveys were erroneous in failing to reflect that fact. If the surveyors had determined that the south channel was navigable, they would have, according to general surveying principles and instructions, meandered and excluded it from riparian tracts. Therefore, insofar as the United States purported to allot the acreage of the south channel to individual Indians based on Shoecraft's and Sheehan's subdivisions of the reservation, it did so on the basis of erroneous surveys.

This brings the court to the third problem. Apart from the surveys and the government patents issued on the basis of those surveys, the Court cannot find any evidence that the United States intended to divide up and assign portions of a riverbed to individual Indians. Indeed, the evidence is entirely inconsistent with such a conclusion.

The background of the treaty negotiations between the United States and the Muckleshoot ancestors indicates a desire on the part of the United States to provide the Muckleshoots with a suitable reservation. United States representatives were well aware that such a suitable reservation must include fishing grounds for the Indians' communal use.

The Treaties concluded between the United States and the Muckleshoot ancestors contained provisions both protecting the Indians' fishing rights and reserving power in the President to divide the reservation lands into allotments for assignment to individual Indians. The only internally consistent interpretation of these provisions is that in dividing up the reservation into allotments, the United States would not act so as to deprive the Indians of their ability to use their fishing grounds. The Court also notes that, as held in *Washington v. Fishing Vessel Association,* 433 U.S. 658, 675-676 (1979), a treaty must be construed, not technically, but as the Indians would naturally have understood it. According to the evidence in this case, the Indian signatories to the Treaties would have understood that the upland areas of a reservation might be divided into individual plots, but that any river flowing through the reservation would remain a communal resource for the use of the Tribe as whole.

Again in 1874, the Muckleshoot Reservation was englarged by executive order specifically to provide the Muckleshoot Indians with access to a river and traditional fishing grounds. The evidence reveals

that the only documented traditional Indian settlement within the reservation as enlarged was located near the confluence of Coal Creek and the south channel of the White River in Section 28, and that such settlements were generally located in the vicinity of fishing grounds. Evidence was also submitted based on anecdotal information from the early 1900's that there were significant runs of fish in in Coal Creek.

Thus the Court confronts a most curious set of circumstances. On the one hand, the acreage of the south channel was included in the allotments assigned to individual Indians pursuant to patents issued by the United States in 1905. On the other hand, the entire history of the relationship between the United States and the Muckleshoot Indians is inconsistent with and in fact militates against the conclusion that the United States intended to divide up the south channel among individual Indians.

The Court has examined caselaw and finds no cases directly on point. However, the court has found three cases addressing situations which it concludes are to varying degrees analogous. In *Montana Power Co. v. Rochester,* 127 F.2d 189 (9th Cir. 1942), the question presented was whether a United States government patent to alloted riparian land on a reservation conveyed title to the low water mark under state law or to the high water mark under federal law. That court concluded that the United States, having agreed to hold the reservation lands in trust for the Indian tribe, could not have intended to put the tribe at the mercy of future state policy which could substantially interfere with or foreclose the Indians' use of the shores for their fishing operations. The court emphasized that the Indian society is communal rather than individualistic, particularly regarding fishing and hunting grounds, and that the right of the tribe to take fish in reservation waters was carefully defined and safeguarded in the relevant treaty.

Sekaquaptewa v. MacDonald, 626 F.2d 113 (9th Cir. 1980), involved a dispute between the Navajo and the Hopi as to the boundary between their reservation lands. The court stated at 118 that: "If there is a general rule, then it is that an incorrect survey may not be relied upon to reduce the legal boundaries of an Indian reservation."

Finally, and most importantly, there is *United States v. Romaine,* 255 Fed. 253 (9th Cir. 1919). In that case, the appellees relied mainly on the testimony and map of a government surveyor who in 1873, under the

direction of the surveyor general, had surveyed and subdivided the Lummi Indian Reservation established by executive order in that same year. The court reviewed the evidence as a whole and concluded that this survey had erroneously excluded certain land at the mouth of the river from the reservation boundaries. The *Romaine* court held as follows at 260:

> We are unable to assent to the proposition that, because article 7 of the treaty reserves to the President at his discretion the power thereafter to remove the Indians from the reservation, the official survey of 1873 was in effect a removal of the Indians from the lands in controversy. The power to survey the lands so reserved in the treaty was the power to cause the whole or any portion of the reserved lands to be surveyed into lots, and to assign the same to individuals or families for permanent homes. The land in controversy was not adapted to such individual use, and there was no occasion to survey it, or to take from the Indians on the reservation the common right to use it for the purposes of fishing and digging shellfish, or other purposes, and the surveyor general, in causing the survey to be made, had no authority to exclude any of the reserved lands from the boundaries of the reservation. The error in failing to extend the survey so as to include the lands in controversy cannot prejudice the rights of the Indians.

Likewise in this case, there is no evidence that the surveyors or the surveyor general had the power to withdraw a navigable stream or fishing grounds from the tribe as a whole thereby contravening specific treaty provisions protecting Indian fishing rights. Nor is there any historical evidence that in issuing patents based on the erroneous surveys, the United States had any intent, express or implied, to withdraw the south channel from the tribe's use as a whole. The Court concludes that the United States had no intent to and did not convey the south channel to individual Indian assignees.

III

Finally, the Court turns to the nature of the changes in the White River's course. While a question of federal law, the impact of the White River's change of course on riparian and riverbed ownership must be settled by reference to the state law otherwise applicable. *Wilson v. Omaha Indian Tribe*, 422 U.S. 653,676 (1979).

The crux of the issue here is thus whether the changes in the river were accretive, as defendants argue, or avulsive, as plaintiffs contend. *Harper v. Holston,* 119 Wash. 436, 442; 205 P. 1062, 1064 (1922), sets forth the definitions of those terms and the legal effect on riparian boundaries:

> [When] grants of land border on running water, and the course of the stream is changed by that process known as accretion — that is to say, the gradual washing away on one side and the gradual building up on the other — the owner's boundary changes with the changing course of the stream.
>
> * * *
>
> On the other hand, it is equally the rule that, when a stream, which is a boundary, from any other cause suddenly abandons its old channel and creates a new one, or suddenly washes from one of its banks a considerable body of land and deposits it on the opposite bank, the boundary does not change with the changed course of the stream, but remains as it was before. This sudden and rapid change is termed in law an avulsion, and differs from an accretion in that the one is violent and visible, while the other is gradual, and perceptible only after a lapse of time.

Thus changes in boundaries of land bordering on running water due to floods, log jams or human rechanneling of rivers are deemed to be the result of avulsive movement. See, e.g., *Rose v. Riedinger,* 13 Wn. App. 222, 534 P2d 146 (1975); *Parker v. Farrell,* 74 Wn2d 553, 445 P2d 620 (1969).

The record overwhelmingly establishes that the history of the White River is a turbulent one, marked by floods, landslides, sudden changes in course, and human interference with the natural river flow ranging from diversions and dams to dynamite blasts. In the face of so much documented historical evidence concerning the river's violent flood patterns and other sudden changes of course, both from natural causes and as a result of deliberate human intervention, defendants' expert witness's testimony that the river had a "natural" tendency to straighten itself by slowly gravitating to the north over the years is not convincing.

More specifically, the Court has carefully compared the Government Land Office plat based on the government survey of 1874 and the next reliable map of the area drawn in 1900 by a Pierce County surveyor. The differences in the course of the White River's north and south channels through Section 28 are striking. The historical documentation

submitted in connection with Thomas Stetson's expert testimony clearly indicates that the principal causes of these dramatic changes were two large landslides in 1898 and 1899, floods, and intervention with the river's flow by citizens of Pierce and King Counties attempting to control their respective flooding problems. Because these events were undeniably avulsive in nature and because there is no evidence that the White River ever returned to its pre-1900 channels in Section 28, the last natural location of the White River's north and south channels is that delineated on the Government Land Office plat based on the survey of 1874.

IV

Therefore, the Court concludes that plaintiffs made out a prima facie case as to the following:

1. Both channels of the White River in Section 28 of the Muckleshoot Reservation were reserved by executive order in 1874 for the exclusive use of the Tribe as a whole.

2. In 1905, the United States conveyed to Jerry Dominick an area lof land denominated Government Lot 3 comprised of 33 acreS more or less and lying entirely north of the 1874 location of the White River.

The Court also concludes that plaintiff has shown that the south channel of the White River was a navigable stream.

Because plaintiffs made the above prima facie showing, 25 U.S.C. §194 shifted the burden of proof and persuasion to defendants in this case to prove that plaintiffs never had title to the three disputed areas or that plaintiffs were divested of title.

The Court concludes that defendants failed to carry their burden of proof. Specifically, they failed to prove that the United States did not in 1874 intend to grant the north and south channels of the White River in trust for the exclusive use of the Tribe as a whole. They also did not prove that the United States intended to and thereafter did convey any portion of the White River's channels within Section 28 to individual Indian assignees. Finally, they failed to prove that plaintiff Dominick

was divested of his interest in the disputed portion of Government Lot 3, or that the Tribe was divested of its interest in the channels of the White River because the course of the White River changed by virtue of accretion or reliction.

DATED ths 6th day of February, 1981.

UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MUCKLESHOOT INDIAN TRIBE, et. al.,
Plaintiffs,

v.

TRANS-CANADA ENTERPRISES, LTD., et. al.,
Defendants.

NO. C77-909R
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS CAUSE having come on for trial on November 5, 1980, the plaintiffs appearing by and through their attorneys, Allen H. Sanders and Richard Reich, and the defendants all appearing by and through defendant Trans-Canada Enterprises, Ltd.'s attorney, Robert Ratcliff and the Court having considered the evidence and brief submitted by the parties, and being fully advised, now enters the following:

FINDINGS OF FACT

1. All Admitted Facts contained in the parties' agreed Pre-trial Order, but not specifically restated in these Findings, are incorporated herein by reference.

Ownership of Riverbed in 1874

2. Northwest Coast Indians of the Puget Sound region viewed watercourses as the center of their respective territories. Rivers were never considered boundaries. The focus of their world was on the rivers along which they lived and the rivers' resources. This characteristic was reflected not only in their dependency on watercourses for food and materials, but also in their manner of self-identification, language and religious practices.

3. Like other Northwest Coast Indians of the Puget Sound region, the ancestors of the Muckleshoot Indian Tribe were highly dependent on

and strongly oriented toward their waterways. In the mid-1800's, many of the aboriginal bands whose descendants comprise the present-day Muckleshoot Tribe lived in villages along the White, Green, Upper Puyallup, Black and Duwamish Rivers and their tributaries.

4. The rivers and streams along which Muckleshoot ancestors lived were the focal point of their economy, culture, and religion. In particular, the ability to harvest fish from the rivers was of vital importance to them. The capture of fish was an essential source of their food supply and an integral part of their social customs and religious practices.

5. The Muckleshoot ancestors' villages generally were sited at river locations suitable for erecting fishing weirs. Prior to and during their treaty negotiations with the United States government in the mid-1800's, they had several important settlements along the White River. At least one such village was located in the vicinity of Coal Creek near the White River's south channel, an area later encompassed within Section 28 of the Muckleshoot Indian Reservation as enlarged in 1874.

6. Fishing by Muckleshoot ancestors was traditionally done on a communal basis. There was no traditional system of individual ownership of fishing areas.

7. Muckleshoot ancestors, placed by the United States government on a reservation along the banks of a particular river, would naturally assume that the river belonged to them for their communal use.

8. Muckleshoot ancestors were parties to the Treaties of Medicine Creek and of Point Elliott, concluded in 1854 and 1855 respectively.

9. Representatives of the United States responsible for negotiating the Treaties of Medicine Creek and of Point Elliott with the Northwest Coast Indians were generally familiar with the Indians' customs and dependence on waterways. They were especially aware of the Indians' reliance on fishing as their prime means of sustenance. This awareness was specifically reflected in the Treaties, which included special provisons protecting the Indians' fishing rights.

10. The Treaties set aside certain specifically described lands for reservations and also provided in Articles 6 and 7 for the establishment of other reservations at locations suitable to meet the needs of the Indian

signatories. Pursuant to the Treaties, the Indians were to have an exclusive right to fish in rivers within their reservation boundaries.

11. Representatives of the United States responsible for negotiating the Treaties were aware of the Indian reliance on the White River and its resources. In 1856, Isaac Stevens, first governor of Washington Territory and chief United States negotiator and signatory to the Treaties, promised the Muckleshoot ancestors a reservation between the White and Green Rivers.

12. However, the Muckleshoot Reservation, as originally established in 1857, was located on a prairie with no access to any river.

13. The Indians assigned to the Muckleshoot Reservation were highly dissatisfied and protested this breach of promise to establish a reservation suitable to their needs.

14. In 1859, Michael Simmons, Indian agent for the Puget Sound region, attempted to ameliorate the situation by publishing notice of a proposed enlargement to the Muckleshoot Reservation which would include land between the White and Green Rivers and would extend to midstream of each river.

15. For nearly fifteen years after Simmon's publication of notice, Puget Sound Indian agents and officers in the Department of Indian Affairs continued the effort to establish an enlarged Muckleshoot Reservation with acess to the White and Green Rivers. The agents' and officers' correspondence from that period reflects a continuing concern about the Muckleshoot Indians' fear that their ancestral homes and traditional fishing grounds would be taken away from them. The agents and officers repeatedly warned that trouble would result unless the Muckleshoot Reservation was enlarged in keeping with prior promises by the United States government to include traditional fisheries on the White and Green Rivers.

16. Finally in 1874, President Grant signed an executive order setting apart five alternate sections of land through which the White River flowed as an enlargement to the Muckleshoot Reservation. The enlargement was a direct result of the United States government's concern that the Muckleshoot Indians be provided a traditional fishery within their reservation boundaries.

17. The checkerboard shape of the enlargement was a special exception to the general federal policy favoring the establishment of compact reservations in order to prevent interspersed Indian and non-Indian lands. This exception was specificlaly made to include a portion of the White River within the Muckleshoot Reservation.

18. In enlarging the reservation, the United States intended to reserve the channels of the White River within the reservation boundaries for the exclusive use of the Muckleshoot Tribe as a whole. The United States also intended that all members of the Tribe residing on the reservation would be able to use the river in traditional and novel ways for their subsistence and livelihood.

Navigability of South Channel of White River

19. In 1874, two channels of the White River flowed through Section 28 of the enlargement to the Muckleshoot Reservation. The parties agree that in this stretch of the White River, the north channel was navigable.

20. As for the south channel, it was used for canoe travel and transport during the latter half of the nineteenth century. Because Indian villages in northwestern Washington were located within easy access of canoe transport, the former existence of an Indian village near the confluence of Coal Creek and the south channel of the White River within the 1874 enlargement of the reservation supports the conclusion that the south channel was navigable by Indian canoes.

21. During the early years of the twentieth century, Indians used canoes during shingle bolt drives down the White River from upstream locations to the mills in the vicinity of Auburn and Sumner downstream from the reservation. Shingle bolts are short lengths of logs from which mills manufacture shingles.

22. For several years prior to 1906, the south channel of the White River flowing through Section 28 of the reservation as enlarged was used for shingle bolt drives.

23. Historical documentation from the period supports the conclusion that from 1897 to 1906, the south rather than the north channel at times carried most of the flow of the White River in Section 28.

24. The testimony and evidence submitted by expert witnesses Thomas Stetson and Dr. Barbara Lane on the navigability of the south channel was both credible and persuasive.

25. The south channel of the White River was a substantial, permanent channel carrying water at ordinary high water flows. It was susceptible to use and was used in the transportation of persons and property for commerce in the customary mode of the day.

Ownership of Riverbed After 1905

26. Article 7 of the Treaty of Point Elliott and Article 6 of the Treaty of Medicine Creek incorporated provisions of Article 6 of the Treaty with the Omahas which authorized the assignment of tribal lands on reservations to individual Indians or families and their heirs. The purpose of these assignments was to provide permanent sites where the assignees would be required to settle and engage in agriculture or risk cancellation of their assignments.

27. Pursuant to the instructions of the Department of Interior, the Muckleshoot Indian Reservation was surveyed and divided into allotments. In 1902 and 1903, an allotment schedule for the assignment of lots to individual Indian families was prepared in accordance with Article 6 of the Treaty with the Omahas. The President of the United States approvied the Muckleshoot Reservation allotment schedule on May 18, 1904.

28. Pursuant to the allotment schedule, the United States in 1905 issued patents conveying the allotments in severalty to various heads of Indian families and their heirs, subject to certain restrictions against alienation specified in the patent.

29. The bed of the north channel of the White River in Section 28 was not included in any of the allotments riparian to it. However, patents which conveyed allotments riparian to the south channel included the bed of that channel in the acreage assigned to individual Indian families.

30. The reason for this difference in treatment between the north and the south channels for allotment purposes lies in the surveys of the enlargement to the Muckleshoot Reservation done in 1867, 1874 and

1903 by government surveyors Ezra Meeker, Ross Shoecraft, and J.J. Sheehan, respectively.

31. Meeker and Shoecraft conducted their surveys pursuant to instructions from the Government Land Office. The instructions provided that the surveyor in the field should meander both banks of a navigable river, meander only the right bank of a nonnavigable but significant river, and meander neither bank of an insignificant stream.

32. In conducting his survey in 1867, Meeker meandered the right bank of the White River's north channel, but meandered neither bank of the south channel. In 1874, Shoecraft resurveyed the Muckleshoot Reservation and subdivided it into forty acre tracts in preparation for the future allotment process provided for in the Treaties of Medicine Creek and of Point Elliott. Shoecraft only remeandered the river where he found its location differed substantially from that shown in the earlier Meeker survey. He did not remeander the river within Section 28.

33. The fact that Meeker only meandered the right bank of the north channel in 1967 and that Shoecraft did not remeander the river within Section 28 in 1874 reflects their conclusion that the river in Section 28 was significant, but not navigable. Contrary to their conclusion, the White River, both north and south channels, was a navigable body of water through Section 28.

34. In 1903, J.J. Sheehan was commissioned to do a boundary survey of the Muckleshoot Reservation in connection with the allotment process. His field notes only fixed the location of the north and south channels where they crossed section lines and did not meander any banks of the White River.

35. A surveyor generally cannot relate lots to a river or exclude the acreage of a riverbed from lots riparian to that river unless he has drawn a meander line along at least one of the river banks. When Shoecraft subdivided Section 28 of the Muckleshoot Reservation into forty acre tracts, he did not exclude the acreage of the south channels's riverbed from tract riparian to it because, based on his erroneous conclusion that the channel was not navigable, he had not meandered either bank.

36. The Muckleshoot Reservation allotment schedule designating the tracts of land to be assigned to individual Indian families was drawn up in accordance with the reservation subdivisions as delineated by

Shoecraft in 1874 and Sheehan in 1903. The land descriptions contained in the government patents of 1905 which conveyed allotments to individual Muckleshoot Indian families were also based on the surveys done by Shoecraft and Sheehan.

37. Apart from the fact that patents issued in 1905 purported to convey the acreage of the south channel's riverbed to individual Indian families, there is absolutely no evidence that the United States government intended to remove the bed of the south channel from those lands reserved for the exclusive use of the Muckleshoot Tribe as a whole pursuant to the executive order of 1874.

38. During the negoitations between representatives of the United States and the Muckleshoot ancestors leading up to the Treaties of Medicine Creek and of Point Elliott, the United States clearly expressed its intent to provide the Indians with satisfactory reservationas and the means to sustain themselves. United States representatives were aware of the importance of fishing to the Muckleshoot ancestors and of their communal use of rivers.

39. The Treaties of Medicine Creek and of Point Elliott contained provisons both recognizing and protecting the Indian signatories' fishing rights, and reserving power in the President to divide reservation lands into allotments for individual Indian families. The Indian signatories would naturally have understood these provisions to mean that the upland areas of a reservation might be divided into individual allotments, but that a river flowing through the reservation would remain a communal resource for the use of the tribe as a whole.

40. The entire history of the negotiations leading up to the enlargement of the Muckleshoot Reservation in 1874 indicates that the United States intended to grant the Indians traditional fishing grounds for the exclusive use of the tribe as a whole.

41. The only documented traditional Indian settlement within the reservation as enlarged was located near the confluence of Coal Creek and the south channel of the White River in Section 28. In keeping with Northwest Coast Indians' cultural and economic reliance on fishing, such settlements were generally located in the vicinity of fishing grounds. Evidence also exists based on anecodtal information from the early 1900's that there were significant runs of fish in Coal Creek.

42. As for the process of devising an allotment schedule in 1902 and 1903, there is evidence that the Indian agent supervising the process on the Muckleshoot Reservation paid no attention to the relationship between the White River channels flowing through Section 28 and the allotments. In correspondence dated September 26, 1902, 1902, Charles Reynolds sent Dr. Charles Buchanan, Regional Superintendent of Indian Affiars, a map of Section 28 designating the allotments to be assigned and the proposed assignees. The map contains no indication of the White River's location.

43. The fact that the acreage of the bed of the south channel was included in conveyances of riparian allotments is not sufficient to establish an intent on the part of the United States to remove the south channel from the use of the Muckleshoot Tribe as a whole. The south channel was included in riparian allotments solely on the basis of surveyors' erroneous judgments that it was not navigable or significant and was thus unworthy of being meandered.

44. There is, furthermore, no evidence that the surveyors of Section 28 of the enlarged reservation were vested with any authority, express or implied, to divest the Tribe of riverbeds which the United States specifically intended to reserve for the Tribe's exclusive communal use pursuant to treaty promises and negotiations. On the contrary, the evidence apart from the patents issued on the basis of erroneous surveys is entirely inconsistent with and militates against the conclusion that the United States intended to divide up the south channel among individual Indians.

Ownership of Government Lot 3 after 1905

45. By patent dated February 3, 1905, the United States conveyed Allotment 7, with appurtenances and in severalty, to Jerry Dominick as head of his family and to his heirs, subject to certain restructions against alienation specified in the patent.

46. Allotment 7 as patented to Jerry Dominick included Goverment Lot 3, which was described as that portion of the southwest quarter of the northeast quarter of Section 28 north of the White River, an area of approximately thirty-three acres.

47. When Allotment 7 was patented to Jerry Dominick in 1905, the southern boundard of Goverment Lot 3 was located along the north

bank of the north channel of the White River in Section 28 of the 1874 enlargement to the Muckleshoot Reservation.

Causes of White River Movement.

48. The earliest reliable map of the White River's course through the Muckleshoot Reservation as enlarged is a Government Land Office township plat based on a survey conducted by Ezra Meeker and approved by the Surveyor General in 1867. As shown on that plat, the White River divided into two channels east of Section 28 of the enlarged reservation. The two channels flowed generally northwesterly through Section 28 and then joined again west of that section into one channel which continued running northwesterly to the Duwamish River and Elliott Bay. The Stuck River in 1867 was a distributary of the White River flowing from the south channel of the White River west of Section 28 and then running in a southwesterly direction to the Puyallup River and Commencement Bay.

49. In 1874, Ross Shoecraft resurveyed Section 28 and the surrounding area as part of a survey of the enlarged Muckleshoot Reservation. Shoecraft's survey was approved by the Surveyor General of Washington in 1874 and reveals no significant changes in the course of the White River in and around Section 28.

50. The next reliable map of the enlarged reservation was completed in 1900 by a surveyor for Pierce County, Washington. This map reflects major changes in the course of the White River through Section 28. The upstream point of separation of the two channels, previously east of Section 28, was located more than one thousand feet downstream within Section 28 itself, and the north and south channels no longer rejoined each other west of Section 28. Instead, the entire south channel flowed directly into and became the Stuck River, while the north channel continued in a northwesterly direction as the White River. Moreover, the configuration and location of both channels in Section 28 had changed. Of particular note is the fact that the position of the north channel had shifted considerably to the north of its location in 1874 in the area of Government Lot 3. After these changes, the portion of the White River's south channel in Section 28 was often referred to as part of the Stuck River.

51. Historical evidence and documentation from the late 1800's and early 1900's reveals that the primary causes for these dramatic changes

in the White River's course through Section 28 between 1874 and 1900 were landslides, floods and human alterations of the river flow.

52. In 1898, the north bank of the north channel in the northwest quarter of Section 28 slid into the river, blocking the channel and diverting the entire river flow into the south channel. Another large landslide caused by dynamiting on July 4, 1899 altered the course of the river within Section 28 and is reported in an article published in the Seattle Post-Intelligencer on July 6, 1899.

53. Prior to 1900, there was also considerable interference with the natural flow of the White River by citizens with agricultural interests in Pierce and King Counties. Settlers in both counties, working against each other, sought to alleviate their respective flooding problems by diverting the river either wholly into the White or the Stuck River. A reported dated May 13, 1907 by Major H.M. Chittenden of the United States Army Corps of Engineers, who had been requested to study the flood problems, states that from 1887 to 1892 there had been "a good deal" of citizen interference near the point of separation of the White and Stuck Rivers. This interference caused a large portion of the White River flood waters of 1892 to go down the Stuck River. The report also states that during the ensuing six years, the flow of the White River had shifted back and forth several times between the north and south channels due mainly to artificial causes.

54. In 1906, a major flood again substantially altered the course of the White River. During the course of the flood, a drift jam formed at the point of diversion between the river's two channels in Section 28, blocking the south channel. However, later in the flood, another jam formed downstream and entirely blocked the north channel west of Section 28. The water washed across the narrow neck of land separating the White and Stuck Rivers and flowed exclusively into the Stuck.

55. Later maps of Section 28 and contemporary historical evidence continue to reveal marked changes in the White River's course. By 1915, the south channel had stopped carrying water on a perennial basis. Except for flood stage overflows from the White River's north channel into the southern portion of the flood plain, the south channel has now been completely dry for at least fifty-five years. The north channel has moved generally north of its location as surveyed in 1900 and has also become considerably straighter.

56. Principal causes of White River movement since 1900 have included major floods in 1906, 1917, 1919 and 1933. Human interference has also played a very large role in determining the course of the White River. From its inception in 1914 until recently, the Inter-County River Improvement Agency, created by joint agreement between King and Pierce Counties, built dams and drift barriers, engaged in continuous drift removal, straightened and lined the north channel, blocked secondary channels and used gravel and rock dikes for bank protection in order to confine the White River to one permanent channel in the northern part of its flood plain. These activities have in varying degrees all affected the movement of the White River in Section 28.

57. The principal causes of river movement between 1874 and 1900 within Section 28, including two large landslides, flooding and human interference, were avulsive in nature. Since 1900, the configuration and location of the White River's channels have continued to change, and have not returned to their pre-1900 state. The last natural location of the White River channels in Section 28 prior to the avulsive events of the late 1800's is reflected in the Government Land Office plat based on Shoecraft's survey of 1874.

58. Insofar as expert witnesses' conclusions regarding the nature of changes in the White River's course differed, the testimony and evidentiary support offered by Thomas Stetson was much more persuasive and credible than that offered by Harry Jones. Although his graphic presentation reflected the same significant alterations in the river's course as Mr. Stetson's, Mr. Jones offered no concrete explanations for the often dramatic changes over relatively brief periods of time. At most, he conceded that the White River had avulsive moments, but then added that it always returned to its pre-avulsive channel or channels and only gradually moved over the years to its present location. Mr. Jones' testimony is not supported by the maps in evidence, much less the historical documentation of the White River's turbulent past.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and upon the arguments of law presented by counsel at trial and in their written memoranda, the Court reaches the following Conclusions of Law:

1. The Court has jurisdiction over the parties and the causes of action stated in this case.

2. Plaintiffs have made a *prima facie* showing that:

(a) Both channels of the White River in Section 28 of the Muckleshoot Reservation were navigable for title purposes in 1874 and during the subsequent period from 1874 to at least 1906;

(b) Pursuant to the executive order of 1874, all portions of the 1874 bed of the White River in Section 28 were reserved for the exclusive communal use of the Muckleshoot Indian Tribe.

(c) In 1905, the United States issued a patent conveying Government Lot 3, an area of thirty-three acres more or less located entirely north of the 1874 location of the White River, to individual Muckleshoot Indian Jerry Dominick as head of his family and to his heirs.

3. Plaintiffs having made the above *prima facie* showing, 25 U.S.C. §194 shifts the burden of proof and persuasion to defendants to prove that plaintiffs either never had any title to the disputed lands or that plaintiffs were divested of their title.

4. Defendants have failed to meet their burden of proof. Specifically, they have failed to prove that:

(a) Plaintiff Tribe was not granted exclusive use of the riverbeds in Section 28 pursuant to the 1874 executive order; or that

(b) The United States did not convey the disputed portion of Government Lot 3 to individual Indian Jerry Dominick and his heirs; or that

(c) The United States government in 1905 intended to and did convey portions of the White River's 1874 south channel in Section 28 to individual Indian riparian assignees; or that

(d) Plaintiffs have been divested of their interests in the 1874 riverbeds and the disputed portion of Government Lot 3 by accretive or relictive movements of the White River.

5. Plaintiffs are, therefore, entitled to an order ejecting defendants from the disputed land comprising the 1874 location of the White River's north and south channels in Section 28 and from this disputed portion of Government Lot 3.

The Clerk of this Court is directed to enter a judgment ejecting defendants from the three disputed areas in this case.

The Clerk is further directed to send uncertified copies of these Findings and Conclusions to all counsel of record.

DATED at Seattle, Washington, this 12th day of February, 1981.

UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MUCKLESHOOT INDIAN TRIBE, et. al.,
Plaintiffs,

v.

TRANS-CANADA ENTERPRISES, LTD., et. al.,
Defendants.

NO. C77-909R
JUDGMENT

THIS MATTER having come on for consideration before the Court, Honorable Barbara J. Rothstein presiding, and the issues having been duly considered and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that all defendants shall be ejected from the three disputed areas of land in this case. If the parties are unable to agree on a surveyor to mark out the disputed areas on the ground, either party may apply to the Court for the appointment of a qualified surveyor.

Costs shall be allowed to plaintiffs pursuant to Rule 54(d), Fed. R. Civ. P.

DATED at Seattle, Washington, this 12th day of March, 1981.

_____

Deputy Clerk, U.S. District Court

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUCKLESHOOT INDIAN TRIBE, et. al.,
Plaintiff—Appellee

v.

TRANS-CANADA ENTERPRISES, LTD.,
Defendant-Appellant
and
HERBERT GUENTHER,
Defendant-Appellant

Nos. 81-3178
81-3197

D.C. No.
C77-909R
ORDER

Appeal from the United States District Court
for the Western District of Washington

Honorable Barbara J. Rothstein
United States District Judge, Presiding

Argued and Submitted: March 2, 1982

Before: KENNEDY, FARRIS and NORRIS, Circuit Judges

The judgment of the district court is vacated and the cause remanded so that the district court, after considering such further evidence and points and authorities as it deems appropriate, may reconsider its ruling in light of *Montana v United States*, 450 U.S. 544 (1981).

APPENDIX K

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MUCKLESHOOT INDIAN TRIBE, et. al.,
Plaintiffs,

v.

TRANS-CANADA ENTERPRISES, LTD., et. al.,
Defendants.

NO. C77-909R
ORDER GRANTING PLAINTIFFS'
MOTION TO REINSTATE JUDGMENT

THIS MATTER comes before the court upon plaintiffs' motion to reinstate the judgment in which this court found that the United States intended in its 1874 treaty to grant the riverbeds of the north and south channels of the White River in trust to the Muckleshoot Indian Tribe for the exclusive use of the tribe as a whole. On March 5, 1982 the Ninth Circuit Court of Appeals vacated the judgment and remanded the cause for reconsideration in light of *Montana v. United States,* 450 U.S. 544 (1981). Having reviewed the motion, memoranda of counsel, and the previous findings of this court, as well as *Montana v. United States,* the court finds and rules as follows:

In *Montana v. United States,* the United States Supreme Court considered the question, essentially the same as the one presented to this court, of whether the United States had conveyed beneficial ownership of the riverbed of the Big Horn River to the Crow Tribe by two treaties entered into with the Tribe prior to the admission of Montana into the Union. In deciding that the Crow Tribe did not own the riverbed, the Court set out several principles. As a general matter the federal government holds lands under navigable waters in trust for the states. The court deciding a question of title to the bed of navigable water must begin with a strong presumption against conveyance by the United States. A court should not find that submerged lands have been conveyed unless the United States was acting because of some special duty or exigency and its intention to convey such land was definitely declared or otherwise made plain. It is established, however, that the

United States may convey such lands and defeat the title of a new state in order to perform international obligations, to effect the improvements of such lands for the promotion and convenience of commerce, or to carry out other public purposes. *Montana v. United States,* 450 U.S. at 551-54, *citing to, Shively v. Bowlby,* 152 U.S. 1, 48 (1894) and *United States v. Holt,* 270 U.S. 49, 55 (1926).

Upon analysis, this court concludes that the reasoning in its memorandum opinion and findings and conclusions, which underlie the court's judgment of March 12, 1981, is not inconsistent with *Montana v. United States.* In fact, the court already assumed the law as creating a presumption against the conveyance by Congress of the bed of navigable waters and found that the intent to convey the riverbed of the White River was made plain. Memorandum Opinion at 3-4. The court's considerations and authorities in rendering its decision were the same ones set forth in *Montana.* The differing results are appropriate given the different treaties, background and historical circumstances of the two cases.

The court found that the focus of the Muckleshoots' world was on the rivers along which they lived and the rivers' resources. They depended on watercourses, not only for food and materials, but also in their manner of self-identification, language and religious practices. The capture of fish was an essential source of their food supply and an integral part of their social customs and religious practices. See Findings of Fact 2, 3, 4, and 5. Muckleshoot ancestors, placed by the United States government on a reservation along the banks of a particular river, would naturally assume that the river belonged to them for their communal use. Finding of Fact 7. Representatives of the United States responsible for negotiating the treaties in the present case were generally familiar with the Indians' customs and dependence on waterways. This awareness was specifically reflected in the special provision of the treaties protecting the Indians' fishing rights. Finding of Fact 9.

Despite the foregoing facts, the Muckleshoot Reservation, as originally established in 1856, was located on the prairie with no access to any river. The Indians assigned to the Reservation were highly dissatisfied and protested this breach of promise to establish a reservation suitable to their needs. Findings of Fact 12 and 14. In 1859, Michael Simmons, Indian agent for the Puget Sound Region, attempted to ameliorate the situation by publishing notice of a proposed

enlargement to the Muckleshoot Reservation which would include parts of the White and Green Rivers. For the next fifteen years, Indian agents and officers of the Department of Indian Affiars continued the effort to establish an enlarged reservation. Their correspondence reflects a continuing concern about the Indians' fear that their ancestral homes and traditional fishing grounds would be taken away. The agents and officers repeatedly warned that trouble would result unless the Reservation was enlarged. The Reservation was enlarged in 1874. The checkerboard shape of the enlargement was a special exception to the general federal policy favoring the establishment of compact reservations; the exception was specifically made to include a portion of the White River within the Muckleshoot Reservation. The United States intended that all members of the Tribe residing on the Reservation would be able to use the river in traditional and novel ways for their subsistence and livelihood. Findings of Fact 14-18.

The Findings of Fact 1-18 which the court made in this case demonstrate that the United States' intention to convey the riverbeds in question was "made plain." *Montana v. United States,* 450 U.S. at 552. There is nothing in the *Montana* decision that would warrant changing the findings and conclusions. The *Montana* Court stated that "the establishment of an Indian reservation can be an 'appropriate public purpose' within the meaning of *Shively v. Bowlby,* 152 U.S. at 48, justifying a congressional conveyance of a riverbed . . . ." *Id.* at 556, *citing Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 85 (1918).

The instant case is very similar to *Alaska Pacific Fisheries v. United States, supra,* which is specifically cited in *Montana* as an example of circumstances justifying the conveyance of beds of navigable waters. There, the Supreme Court looked to the Metlakhtla Tribe's historical dependency on waterways. The defendant argues that *Alaska Pacific* did not deal with title to the bed of the adjacent waters, but rather only with the question of fishing and water rights. Defendant misreads that case. The Supreme Court stated,

> The principal question for decision is whether the reservation treated by the Act of 1891 embraces only the upland of the islands or includes as well the *adjacent waters and submerged lands.* The question is one of construction — of determining what Congress intended by the words, "the body of lands known as Annette Islands."

(emphasis added). *Alaska Pacific Fisheries v. United States,* 248 U.S. at 87.

As defendant points out in his memorandum, in order to determine what Congress intended by "the body of lands known as Annette Island," the Supreme Court considered the fishing background of the Metlakhtla Tribe. Furthermore, it was precisely this point which the *Montana* Court relied on to distinguish the claim of the Crow Indian Tribe to the Big Horn River. Unlike the Metlakhtla Indians' situation, the treaties with the Crow presented no public exigency because "the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." *Montana v. United States,* 450 U.S. at 556. Defendant's memorandum states:

> The [Muckleshoot] Tribe's case is based upon undisputed historical evidence that the Tribe would have expected its fishing and water rights to be preserved in the Treaty and Executive Order. That historical evidence is compelling and persuasive as to fishing and water rights.

Memorandum of defendant at 6.

Defendant's insistence that the "undisputed historical evidence" is unpersuasive on the question of title to the riverbed is undermined by his misreading of *Alaska Pacific.* Not only would the Tribe have expected its fishing and water rights to be preserved in the Treaty and Executive Order, but those documents were the result of negotiations which took place because of the express concern of government officials that if the Muckleshoots were not given exclusive use of section of the White River, there would be an outbreak of hostilities.

The *Montana* court cited *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970) as another case which justified a finding of the intent to convey made plain by the circumstances of the unusual history of the treaties at issue there. According to the Court in *Montana, Choctaw* resulted from the special history of broken promises by the government and increasing distrust of the tribe. After several relocations, the tribe signed a treaty which granted reservation lands in fee simple and promised they would not become part of any State or Territory. Id. at 555-56 n. 5.

Similarly those tribes composing the Muckleshoot Tribe faced broken promises and confinement to reservation lands where they could not sustain themselves. Their protestations and increasing hostility

aroused fear that unless they were given suitable lands, there would be trouble. Finally, the reservation was enlarged to include sections of the White River. The enlargement was intended to reserve the channels of the river within the reservation for the exclusive use of the Muckleshoot Tribe. As in *Choctaw* there was no express conveyance of the riverbed.

Finally, the court's prior findings and conclusions are supported by the reasoning in *Confederated Salish & Kootenai Tribes v. Namen,* 665 F.2d 951, 960-62 (9th Cir. 1982). In *Namen* the Ninth Circuit held that the bed of the southern half of Flathead Lake belonged to the Indian tribes and distinguished *Montana.* As here, the Court of Appeals relied on the Kootenai Indians' historical reliance on fishing and on the specific reference in the Hell Gate Treaty to the Flathead Lake. *Namen,* 665 F.2d at 962. There was no express conveyance in the Hell Gate Treaty, but the boundary set therein bisected the lake. The Court reasoned that the natural way of understanding the boundary description was to infer an intent to convey the southern half of the lake and with it the lake bed. *Id.* The situation and reasoning is analagous to both this court's memorandum opinion and its findings and conclusions.

For the foregoing reasons, IT IS ORDERED that plaintiffs' motion to reinstate this court's judgment of March 12, 1981 is GRANTED.

The clerk of the court is directed to send uncertified copies of this Order to counsel of record.

DATED at Seattle, Washington this 9th day of July, 1982.

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MUCKLESHOOT INDIAN TRIBE, et. al.,
Plaintiffs,

v.

TRANS-CANADA ENTERPRISES, LTD., et. al.,
Defendants.

CIVIL ACTION FILE NO. C77-909R
JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Barbara J. Rothstein, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the Court grants plaintiff's motion to reinstate judgment.

Dated at Seattle, Washington, this 9th day of July, 1982.

_____

Deputy Clerk of Court

Supreme Court, U.S.
FILED
JAN 17 1984

NO. 83-833

IN THE
Supreme Court of the United States

October Terms 1983

THE MUCKLESHOOT INDIAN TRIBE, et al.

Respondents,

v.

TRANS-CANADA ENTERPRISES, LTD., et al.

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JEFFREY S. SCHUSTER
COUNSEL OF RECORD
Office of the Tribal Attorney
Muckleshoot Indian Tribe
39015 172nd Avenue S.E.
Auburn, WA 98002
(206) 939-3311

Of Counsel:
Robert L.
Otsea, Jr.

QUESTION PRESENTED

1. Whether the district court and court of appeals correctly found that the United States and the Muckleshoot Indian Tribe intended to reserve title to the bed of the White River when the Muckleshoot Indian Reservation was set aside?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

NO. 83-833

THE MUCKLESHOOT INDIAN TRIBE, et al.

Respondents,

v.

TRANS-CANADA ENTERPRISES, LTD., et al.

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

I. OPINIONS BELOW

The two district court opinions are included in Petitioners' Supplemental Appendices G and K except that page A-76 is missing from Appendix K. The district court's findings of fact and conclusions of law are represented at Supplemental Appendix H. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 713 F.2d 455 (1983).

II. JURISDICTION

The Muckleshoot Tribe does not disagree with the petitioners' jurisdictional statement.

III. STATEMENT OF THE CASE

The Muckleshoot Tribe agrees with the petitioners'[1/] statement of the case except as noted below.

A. Procedural History

The Muckleshoot Tribe initiated this proceeding in 1977 to eject the petitioners from possession of the former riverbed of both the White River and the land between the former and present northern channels of that river within Section 28 of the reservation. The case was tried to the district court.

In a detailed set of findings based on extensive contemporaneous evidence the district court concluded that the United

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1/ As used in this brief the "petitioners" or "Trans-Canada" shall mean Trans-Canada Enterprises, its parent company, N.B. Cook Company, as well as Synergy International, Ltd. and Herbert Guenther.

States had intended to reserve the bed of the White River for the Muckleshoot Tribe when it created the Muckleshoot Reservation in 1874. Petitioners' Appendix, A-47, 58 (hereinafter referred to as "App. _____").

Following the entry of the district court's judgment on March 12, 1981, the petitioners appealed that court's ruling. The petitioners did not appeal the district court's decisions on the White River navigability and the nature of the changes in the river's course. Accordingly the Ninth Circuit did not consider those issues on appeal nor are they before the Court at this time. See, Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., 713 F.2d 455, 458 n.3 (9th Cir. 1983). Petitioners also do not appeal the issue of whether the allotment of tribal land to individual tribal members divested the tribe of title to the riverbed. The only issue presented in the petition is whether both lower courts incorrectly found

that the United States and the tribe intended to reserve the bed of the White River for the Muckleshoot Tribe when the Muckleshoot Indian Reservation was created.

Following the appeal of the district court's judgment, this Court issued Montana v. United States, 450 U.S. 544 (1981). In order to give the district court an opportunity to reconsider its ruling in light of Montana, supra, the Ninth Circuit vacated and remanded the original district court judgment. App. J. After briefing by all parties on the impact of Montana the district court reinstated its judgment. App. K.

On March 15, 1983, the Ninth Circuit affirmed the district court's judgment in a per curiam opinion. See Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., supra. The Puyallup Tribe's case referred to in petitioners' brief was decided the same day as the Muckleshoot case by the court of appeals but was never formally consolidated

with the instant case.

B. Statement of Facts

As petitioners have noted, the lower courts found that fishing on the White River and other rivers and streams was clearly the single most important activity for the Muckleshoot Tribe. The River was important not only because of the Tribe's dependence on fishing for food but also because the River was the center of other food resources as well as the Tribe's religious, cultural, and social customs. App. H. A-59; App. K, A-74; App. A, A-5; see also United States v. Washington, 384 F.Supp. 312, 365-367 (W.D. WA 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976), aff'd sub nom, Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). Traditional fishing by the Muckleshoot Tribe was done on a communal basis rather than individual basis. App. H, A-59.

Traditional fishing techniques required not only the water of the river but also the riverbed itself on which the Indians constructed fish weirs and traps. App. A, A-5. Fish weirs and traps were large fence-like, structures planted in the bed of the river in order to catch fish migrating up river.

Muckleshoot ancestors lived in villages along the White River where they constructed fish weirs and traps which spanned the River. One village and weir site was located in the immediate vicinity of the land in dispute near the junction of the White River and Coal Creek. App. H, A-59, F.F.5.

Following the treaties of Medicine Creek and Point Elliott the President established the Muckleshoot Reservation by Executive Order in 1857. The Reservation was located on a prairie between the Green and White Rivers with no access to either one. App. H, A-61 at F.F. 12.

The record shows that the Muckleshoot

Indians believed that a promise to establish a reservation suitable to their needs had been broken. Id. F.F. 13. In response the local Indian agent in 1859 attempted to correct the situation by publishing notice of a proposed enlargement of the reservation to include lands between the White and Green rivers. Id. at F.F. 14.

From then until 1874 the Indian agents and government officials continued the effort to enlarge the Muckleshoot Reservation to provide access to the White and Green Rivers. The correspondence in this period reflects a continuing concern about Muckleshoot fears that their ancestral homes and fishing grounds would be taken. The agents "repeatedly warned that trouble would result unless the reservation was enlarged in keeping with prior promises" of the United States to include the traditional fisheries on the White and Green Rivers. Id. at F.F. 15.

Finally, in 1874, President Grant issued

an Executive Order setting aside five alternate sections of land through which the White River flowed. This was an addition to the existing Muckleshoot Reservation. Id. App. H, A-61, F.F. 16.

The checkerboard shape of the addition was an exception to United States policy at the time in favor of "compact reservations to prevent interspersed Indian and non-Indian lands." See map at App. F. This exception was made "specifically to include a portion of the White River within the Muckleshoot Reservation." App. H, A-61, F.F. 17.

With the exception of finding of fact 18, the petitioners have not contested on appeal the district court's findings of fact. TransCanada asserted in the Ninth Circuit that Finding 18 is not a finding of fact but a conclusion of law.

IV. SUMMARY OF ARGUMENT

This case does not merit review by the Supreme Court since it involves only an

attempt to have yet another court review the findings below of the district court that were affirmed by the Ninth Circuit Court of Appeals. The lower courts applied the decision by this Court in Montana v. United States, 450 U.S. 544 (1981) to the facts and correctly determined that the United States and the Tribe intended to reserve the bed of the White River when the Muckleshoot Reservation was declared. The only real dispute is whether the lower courts correctly determined United States intent.

Petitioners' effort to create the appearance of a conflict with Montana v. United States ignores the detailed, comprehensive record below that shows that United States intended to reserve the bed. There is no conflict with either Montana or other Ninth Circuit decisions. The decision below also does not conflict with State of Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983). The Seventh Circuit applied the

Montana title principles in a jurisdictional dispute whereas this involves only a title issue. Both Circuits agreed on the applicable law but reached different results based on the strikingly differently facts.

V. ARGUMENT

A. This Case Does Not Merit Review Because the Courts Below Applied The Standards of Montana v. United States, 450 U.S. 911 (1981) To The Findings Of Fact.

This case does not merit review by the Supreme Court since it involves only the routine application of settled law to undisputed facts. Petitioners are unhappy with the lower court's application of Montana v. United States, 450 U.S. 911 (1981) to the facts in this case and seek one more chance to present their case to another court. This is not a substantial basis for review by this Court.

The court of appeals affirmed the detailed and "carefully considered" district court findings that title to the bed of the White River was reserved for the Muckleshoot

Tribe when the reservation was created. Id. 713 F.2d at 456. In making this ruling the court of appeals applied established principles of law in Montana and its predecessors to a different tribe and reservation in a different part of the country than that at issue in Montana.

As petitioners implicitly admit (Pet. at 6) each case applying the Montana test requires an individualized scrutiny of the historical facts to determine the intent of the United States and the Tribe. See, Montana at 552-554. Montana requires a showing of intent that is made in "clear and special words" or "otherwise made plain."[2/] Montana, 450 U.S. at 554. All parties agree that Montana applies. Petitioners only seek to check the correctness of the lower court's findings on United States intent when it

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2/ The establishment of an Indian reservation can be an "appropriate public purpose" justifying a pre-statehood reservation in trust for an Indian tribe. Montana v. United States, 450 U.S. at 556.

created the reservation. But questions of intent are factual issues which are best left to the trier of fact. See e.g., Morissette v. United States, 342 U.S. 246, 274-276 (1952). A challenge to factual findings without more does not normally present a "special and important reason" justifying review under the Supreme Court Rule 17.

Both the district court and Ninth Circuit undertook the careful examination required here. Indeed, the court of appeals first remanded this case back to the district court for further consideration in light of Montana v. United States, which had been decided after the original district court opinion and findings. See App. J at A-72. The court of appeals affirmed the district court's findings only after the district court again reviewed the case and record after Montana. App. K at A-73. Petitioners chose not to submit evidence to the district court on remand and, in fact, all of the

district court's findings remain uncontested with the exception of finding of fact 18.

Since the issue is the correctness of both the district court rulings and their acceptance by the court of appeals, review has generally been found inappropriate "in the absence of a very obvious and exceptional showing of error." Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 635 (1967), quoting with approval Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

B. The Decisions Of The Courts Below Do Not Conflict With Montana v. United States.

Petitioners seek to create the appearance of an actual conflict with Montana by oversimplifying the lower court's decisions. As shown above the district court's findings were based on a thorough review of the tribe's culture and history and on the historical circumstances surrounding the creation of the reservation. The lower courts did not find the requisite intent to

reserve title to the riverbed solely on a bare finding of "historical tribal dependence upon fishing." Compare, Petition at i., Question Presented. The evidence of a plain intent to reserve the White River bed goes well beyond that. Petitioners admit that the White River itself was crucial to the Muckleshoot Tribe:

> The rivers and streams along which they lived were the focal point of their economy, culture and religion. They were dependent on these watercourses for food, materials, self-identification, language and religious practices.

Petition at 2.

The Muckleshoot Reservation was expanded in 1874 for the express purpose of providing access to traditional fishing grounds on the White River. This expansion followed years of concern by the federal government about Muckleshoot fears that their traditional fishing grounds and homes would be taken and that trouble would result. App. A-60. In response to these concerns, the President

created an unusual elongated, reservation through which the White River flowed with a primary purpose of providing access to the White River. App. A-60, 61.

One Muckleshoot village, located near the disputed area of the riverbed, had a fish weir which required express use of the riverbed for its construction and operation. See Statement of the Facts I, B, supra at 4.

The district court thus found United States intent based on historic Indian use of the riverbed coupled with express United States statements and actions to protect that use. App. A-75, 76, F.F. 13-18. The detailed careful findings show more than a dependency on fishing. They also show that the court's decisions do not rest on the "mere fact that the bed of navigable water lies within the [reservation] boundaries." Montana at 554 quoted in Petition at 7.[3/]

3/ Similarly fishing is not relevant only to the existence of a public exigency but also as evidence of intent. Compare Petition (cont'd)

The district court's findings are certainly sufficient to satisfy this Court's decision in Montana . Indeed, even though there is more than just evidence of dependence on fishing, that by itself may be sufficient under the Montana line of cases.[4/] As an example of the necessary plain intent required to reserve title for a tribe, the Montana Court cited Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) as contrast with the Crow Tribe's situation. Montana at 556. In Montana the Court noted that the Crow Tribe was chiefly dependent on buffalo and that fishing was relatively unimportant. Id.

Footnote 3/ Cont'd
at 8. Moreover, an additional public exigency for reserving the bed was the perceived need to prevent trouble between the Indians and nearby non-Indians should Muckleshoot not have its riverbed and fishery secured for it. App. A-60, F.F. 15.

4/ The lower courts were not only not clearly erroneous but were in fact supported overwhelmingly by the evidence none of which is disputed by the petitioners. See 713 F.2d at 456.

In Alaska Pacific Fisheries, Congress reserved for the Indians "the body of lands known as Annette Islands." Id. 248 U.S. at 78. The Court held that the language was intended to include the land under the navigable waters surrounding the islands when viewed in the context of the historical "circumstances in which the reservation was created." Id. Like the Muckleshoot Indians, the Metlakahtla Indians were encouraged to inhabit a reservation whose primary value was for the fisheries running through it. The dry upland in neither case were sufficient to satisfy the Indians' needs especially in light of the fact that both tribes were primarily fishermen. Id. at 88. And in both cases the reservation were set aside expressly to provide a livelihood for the Indians.

Since - as petitioners concede - the Muckleshoot Indians were and are highly dependent on White River fishing and since the United States was aware of this need in

the instant case and responded to it, the lower courts were not incorrect to rely on this as evidence of intent to reserve the riverbed. Evidence of dependence of fishing was certainly found to be highly relevant by both the Montana and Alaska Pacific Fisheries courts.

Despite the clear relevance of fishing to bed ownership in Montana and Alaska Pacific Fisheries, petitioners present a variety of arguments in an attempt to prove that the lower courts incorrectly decided this case. Petitioners first argue that the court of appeals erroneously relied on the rule that ambiguous statements are to be construed in the Indians favor. Pet. at 11. There is no evidence that this rule, is inconsistent with Montana. The lower courts carefully applied this Court's principles from Montana and Alaska Pacific Fisheries in reviewing the evidence. And is rule of construction as cited with approval in Alaska

Pacific Fisheries, 248 U.S. at 89. The district court and court of appeals recognized the duty to find a plain or express statement of intent to justify reservation of the bed. Petitioners do not show that the court of appeals ever shifted the burden of proof away from the tribe.

Secondly, petitioners argue that because the Muckleshoot Tribe is a successor to signatories of the Treaties of Point Elliott (12 Stat. 927) and Medicine Creek (10 Stat. 1132) its fishing rights were already protected before the creation of the reservation. Pet. at 13. This issue was before the lower courts that held that the United States and the Tribe still intended to reserve the riverbed for the Tribe as an additional guarantee of the reservation fishery. Because of the trouble with surrounding non-Indians, the Muckleshoot Tribe believed that they still had to reserve the riverbed to insure access on-reservation to their

fishery for their fish weirs and traps. App. A-60-61.

Petitioners also argue that there is no legal or logical connection between ownership of the bed and protection of fishing rights. Pet. at 13-14. As already shown, however, there is basis in both law (Montana and Alaska Pacific Fisheries) and logic for this connection. See, Statement Of Facts, supra at 5-8. Moreover, the ultimate question is the intent of the parties in 1874, not present day common law principles. There is no evidence on the record that either the Indians in 1874, the President or any of the government officials understood the common law on the relationship between real property, water rights and fisheries or that they intended to incorporate that into this Executive Order. Compare, Fishing Vessel Association, supra 443 U.S. at 658, n.23.[5/]

5/ Moreover, such common law principles do not apply in determining rights reserved when Indian reservations are created whether they (cont'd)

Petitioners present no argument to satisfy their burden of showing that the district court or the court of appeals acted incorrectly let alone "has departed from the accepted and usual course of judicial proceedings. . ." to warrant review by this Court. Compare, Sup.Ct. Rule 17.1(a).

C. There Is No Conflict Among The Cases In The Ninth Circuit Court Of Appeals.

There is nothing in the other recent Ninth Circuit cases cited by petitioners that conflict with Montana to call for the grant of their petition. All of the cases applied Montana in a variety of factual contexts to determine whether the district courts had been clearly erroneous in their findings. Depending on the tribe and reservation, the court of appeals found the necessary intent to reserve the navigable bed in some cases.

Footnote 5/ Cont'd
be water rights, Arizona v. California, ____ U.S. ____ 103 S.Ct. 1382 (1983) or fishing rights, Menominee Tribe of Indians v. United States, 391 U.S. 404, 406 (1968).

E.g., Confederated Salish and Kootenai Tribe v. Namen, 665 F.2d 951 (9th Cir. 1982) cert. denied ____ U.S. ____, 103 S.Ct. 314 (1982); United States v. Washington, 694 F.2d 188 (9th Cir. 1982) cert. denied ____ U.S. ____, 103 S.Ct. 3536 (1983); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983) petition for cert. filed ____ U.S.L.W. ____ (Dec. 9, 1983). In other cases the court has found the necessary intent lacking. e.g., United States v. Aranson, 696 F.2d 654 (9th Cir. 1983) cert. denied ____ U.S.L.W. ____ (Nov. 14, 1983). At issue in all cases is a factual dispute. Although the Ninth Circuit may have concluded that dependence on fishing is highly relevant, there is nothing to indicate that other evidence is not also required to show the necessary intent.

D. There is No Conflict Between The Ninth Circuit and the Seventh Circuit.

Contrary to petitioners' assertions, there is no true conflict between the Ninth

Circuit decision and State of Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983). Although the Seventh Circuit did use the Montana title test, the issue was not whether the tribe owned the bed of a navigable lake or river but whether it had jurisdiction to regulate non-Indian activity on those on-reservation lakes. 698 F.2d at 1334-1335.[6/]

Moreover, the Circuits did not disagree on the applicable law. Rather they reached different conclusions as to Indian ownership of the submerged lands at issue but applied the same test from Montana. The different result can be attributed to the courts looking at different Indian reservations created under strikingly different facts. The finding of fact in Baker, unlike the present

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6/ The Court then applied Montana to determine whether the intent in a 1854 Chippewa Treaty to oust the State of Wisconsin from jurisdiction on these lakes was "definitely declare or otherwise made plain" or of a "public exigency." Id. 698 F.2d 1323 quoting Montana, supra 450 U.S. at 552 quoting United States v. Holt State Bank, 270 U.S. 49, 55 (1926).

case, was that there was "nothing in the language or history of the [post-statehood] treaty to suggest that in 1854 the United States was more solicitous of Chippewa fishing and hunting rights in navigable waters then of state sovereignty." Id. at 1335. Secondly, the Indian reservation was not created until after statehood unlike this case where the reservation was created and expanded many years prior to statehood. And there was nothing in the record or findings there to "charge the United States with knowledge of the Chippewas' understanding or to warrant the inference that the United States intended to convey such a power." (cite omitted) Id. The uncontested findings in the instant case are completely different.

It is not a valid basis for review merely because both courts, applying the same test, reached different conclusions based on different facts.

VI. CONCLUSION

For the above reasons the petition for a writ of certiorari should be denied.

DATED this _____ dav of January, 1984.

Respectfully submitted,

Of Counsel:
Robert L.
Otsea, Jr.

JEFFREY S. SCHUSTER
Office of the Tribal Attorney
Muckleshoot Indian Tribe